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Theories of origin as to the progenitor of the trust: the invention of the uses and the Franciscan influence in England

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# THEORIES OF ORIGIN AS TO THE PROGENITOR OF THE TRUST: THE INVENTION OF THE USES AND THE FRANCISCAN INFLUENCE IN ENGLAND

Thanos Zartaloudis<sup>1</sup>

## SUMMARY

This paper examines the numerous famous theories as to the origin of the English device of the trust during the middle ages with particular reference to the influence of the Franciscans in relation to the device of the use. It argues that the influence of the Franciscans and the continental disputes over apostolic poverty and church property needs to be explored in more detail by legal historians and also that the «origin» of the English use, the progenitor of the trust, as well as the trust itself, lies in an assemblage of possible influences and juridical transplantations.

Questo articolo esamina le numerose teorie famosi come l'origine del dispositivo in inglese del trust nel medioevo, con particolare riferimento all'influenza dei Francescani in relazione al dispositivo di «use». Essa sostiene che l'influenza dei francescani e delle dispute continentali sulla povertà apostolica e la proprietà della Chiesa deve essere esplorata più in dettaglio gli storici del diritto e, inoltre, che «l'origine» del «use», il progenitore del «trust», così come la stessa fiducia, si trova in un assemblaggio di influenze e trapianti giuridici.

## 1. A NOTE

The trust, in Anglo-American law, is an apparatus of management or stewardship whereby one party (the trustee) acts on behalf of another party (the beneficiary). It is a remarkable device which

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when enforced by law, imposes or safeguards a juridical relationship between two parties, whereby one party acts entirely in the interest of the other. It is a versatile legal concept, like contract, which can be used for a multiplicity of ends, whether beneficial to particular personal/social or exploitative ends. The trust, in England, is an old device which has evolved into its current form over five centuries and it originates in the thirteenth century, if not earlier, in the initially customary and eventually legal device of the use. The trust has known different formulations: most notably a differentiation is drawn between Anglo-American trust and civilian forms of legal trusting. The difference is based on the conceptual distinction between laws of entrusting and the particular form which the Anglo-American law of trusts takes. The characteristic identification of the trust is based on the distinction (to an extent strategic and to another extent contingent distinction) between two types of title: legal and equitable/beneficial. This distinction is not known as such in the civilian traditions, which hold, instead, to a unitary concept of ownership, though this differentiation should not be exaggerated.<sup>2</sup> In a similar way there is a significant more general distinction to be noted between laws of using things and the law of uses (in its particular formation in England).<sup>3</sup> Once these distinctions are kept in mind, it is important to acknowledge, further, the historical distinction between early customary forms of using and the juridical means that were invented within the English jurisdictions as such (ecclesiastical, equitable, common law).

In this paper<sup>4</sup> we examine in a preliminary and largely schematic manner the numerous theories on the origin of the trust, with regard to the development and utilization of the earlier device of the use, while considering the possible Franciscan influence on the employment of the use in England during the thirteenth century and beyond. This brief investigation needs to be placed within a number of crucial cautionary aspects. The first note of caution has to do with the fact that the legal influence of the Franciscans in England -and perhaps more generally- appears to be collateral to their vow of apostolic poverty and extra-legal means of simply using things without claiming

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<sup>2</sup> FRANS SONNEVELDT, *The trust-an introduction*, in F. Sonneveldt & H. L. van Mens, eds., *The Trust-Bridge or Abyss between Common and Civil Law Jurisdictions?*, The Netherlands, Kluwer Law International, 1992. For a comparative argument against the idea that the trust proper is only Anglo-American in its manifestation, see MARIUS JOHANNES De WAAL, *The Core Elements of the Trust – Aspects of the English, Scottish and South African Trusts Compared*, «South African Law Journal» 117 (2000), pp. 548-571. The typical differentiation is based on the idea that only in common law can one find a separation of title from beneficial interest. Yet in later continental feudal law one finds the distinction between *dominium directum* and *dominium utile*.

<sup>3</sup> While the uses in the Anglo-American tradition are widely considered to be the progenitor of the trust, there are also differences between the two devices. For the distinction between uses and trusts see NEIL G. JONES, *Uses, trusts, and a path to privity*, «Cambridge Law Journal», 56 (1997), pp. 176-82. See also JÖRN ECKERT, *Use, trust, strict settlement*, in G. Köbler & H. Nehlsen, eds., *Wirkungen europäischer Rechtskultur*, Festschrift für Karl Kroeschell, C. H. Munich, Beck'sche Verlagsbuchhandlung, 1997, p. 187.

<sup>4</sup> This paper is a preliminary version of the third chapter in a book that is being prepared for 2014, titled *The Use of Things*. The first two chapters examine in detail the continental disputes on apostolic poverty and the invention of the Franciscan device of the *simplex usus facti*.

ownership in them. If the Franciscans invented the manner of *usus simplex facti* through a variety of interpretations in order to serve their needs in the context of the continental disputes over apostolic poverty and papal power as well as Church property, it remains collateral that they may have influenced particular legal developments in England and on the continent.

Another element of caution has to do with the speculative manner of scholarly analyses of the history of the related English developments given the fact that detailed early legal reports are not available. Furthermore, later cases of relevance are few. As we shall discuss later on in more detail it seems that only one early case of relevance to the friars' practice is reported, whereas the later cases on English legal uses deal with matters other than those concerning the friars. It is also worth noting that concentrating on the cases heard in one court (i.e. common law courts)<sup>5</sup> as opposed to, for instance, cases heard in the ecclesiastical courts, could lead to a misreading of the actual situation, not to mention the need to consider as well the differences of practices within even a single judicial jurisdiction.

A third closely related element of caution has to do with the more general fact that the many celebrated Anglo-American legal historians and scholars who have explored this subject from the nineteenth century till today, offer, to one extent or another as we examine in schematic detail below, many alternative explanations for the extent of the Franciscan influence and the origin of English uses as such, on the basis of often conflicting sources. It is important to underline the frequent lack of evidential support for many claims which are raised as mere assumptions and yet presented with more certainty than is possible. It is suggested here that speculation cannot be avoided, while in the meantime the amalgamation of different sources in the English customs and jurisdictions remains the most feasible guide as to the origin of the early uses and the subsequent developments. In fact a key problematic feature of such «origin theories» lies with the obsessive search for a definitive, singular and juridically rational so-called origin as such. Much can be gained if historical research refrains from two inherent moves in such an approach to the so-called origin, more generally: (a) It is crucial to avoid this obsessive origin for practical reasons as well as for the fact that the method of the origin presupposes an approach that hinders study. Instead, we can think of the quest for sources in the sense of an «amalgam» (though one that does not fuse its

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<sup>5</sup> A parallel perspective can be maintained as to the view that the common law simply ignored uses. «While the common law did not enforce uses,» Seipp has recently argued, «it took account of uses in many ways, and recognized and enforced fiduciary duties in other relationships. Judges, lawyers, legislators, and treatise writers integrated these uses into the fabric of the common law. They wrote extensively about uses, and they identified trust as the essence of these arrangements. The impression that the common law ignored uses arose after uses had been familiar for two centuries. This impression arose from a political assault on this pervasive landholding arrangement, with the intent to collect more revenue for the king.» DAVID J. SEIPP, *Trust and Fiduciary Duty In The Early Common Law*, «Boston University Law Review», 91 (2011), pp. 1011-1037: 1012.

elements into a unity), or even better in the sense of an «assemblage» (whereby different sources, concepts and situational contingencies intersect without a central unifying reason); (b) it is important to avoid the characterization and understanding of the designated «pre-juridical» (concept, practice, custom, etc.) in juridical terms, since this always hinders the appreciation of how assemblages, in fact, form.

The fourth caution pertains to the early employment of the device of the use by the ecclesiastical authorities in England which we shall examine below in more detail. For now it is worth noting that from the time when the Chancery took over the jurisdiction on uses:

[...] the clergy, having the use, had at common law no title to the land, yet in the Court of Chancery (which administered the equitable jurisdiction of the sovereign), presided over by one of their own order (a person no doubt deeply imbued with the Civil and Canon laws), it was adjudged that the prelates took the beneficial estate and interest. It was in this manner Uses originated with all their attendant learning, advantages and inconveniences, and which in later years became universal, revolutionising the law of real property, creating in fact new species of interests therein, and leading to new methods of conveyancing unknown to the Common law.<sup>6</sup>

In parallel, the friars could be seen to be, at first, well accommodated in the customary mechanism of uses since under uses the *cestuis* had no rights enforceable at common law against feoffees holding for their benefit. The uses facilitated not a *de jure* but a *de facto* devisability of a freehold. Yet it is important to note that feoffments to uses, in their transition from a customary to a semi-legal and eventually a legal mechanism, rendered the *cestuis que use* as holders of a right which would contravene, in principle, the friars' vow. Feoffment to uses, in any case, were arguably not an invention of the Franciscans, but something they eventually adopted given that it was already serving the needs of indigenous private arrangements and had derived from apparently non-ecclesiastical sources.<sup>7</sup>

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<sup>6</sup> MATTHEW G. JOHNSON, *Ecclesiastical Influences*, «Law Magazine & Review: A Quarterly Review of Jurisprudence», 5th ser., 32 (1906-7), pp. 399-406: 403. See also TIMOTHY S. HASKETT, *The Medieval English Court of Chancery*, «Law and History Review» (1996), pp. 245-313. The influence of canon and civil law on the work of the Chancery Court has been studied in two prominent works: HELMUT COING, *English Equity and the Denunciatio Evangelica of the Canon Law*, «Law Quarterly Review» 71 (1955), pp. 233-241 and JOHN L. BARTON, *Equity in the Medieval Common Law* in R.A.Newman, ed., *Equity in the World's Legal Systems*, Brussels, Emile Bruylant, 1973, pp. 139-55.

<sup>7</sup> See JOHNSON, op.cit.n.6.

Further to the complexity of the early customary development of the use in England it is worth posing the final caution which has to do with the term «use» as such. The notion of use in England can be located in early custom in a similar sense to using, trusting or relying on someone else, rather than in the later ecclesiastic or legal senses. In this manner, the early social custom of entrusting or using things of another needs to be seen from the start as an evolution of an extra-legal mechanism into a legal apparatus or device, which eventually erased its informal origin in order to justify its juridical legitimacy. For instance, Earl Jowitt explained that in law, as in ordinary language, use denotes the act of employing a thing: «thus, to cultivate land, to read a book, to inhabit a house, is to use those things.»<sup>8</sup> Use also means benefit: «thus, in an ordinary assignment of chattels the assignor transfers the property to the assignee for his absolute use and benefit»<sup>9</sup> When Jowitt considers the use as the beneficial ownership, he writes: «The use or beneficial ownership was treated like an estate, and descended on the intestacy of the *cestui que use* to his heir in the same way as the land would have done. A use was also devisable by will, although the land was not.»<sup>10</sup> What is of interest to us is the long process through which the use was transformed from a social relation of at least some informality, into a juridically recognized estate. When Megarry and Wade, in turn, write of the use they argue, following Maitland as we shall examine below, that:

The word use was derived not from the Latin *usus* but from the Latin *opus* in the phrase *ad opus* (on his behalf), via the Old French *Al oes* (...) and hence A to the use of it: thus land might be conveyed to and his heirs A to the use of B and his heirs, where nowadays we should say A in trust for B.<sup>11</sup>

We shall return to this below in the discussion of the numerous theories on the origin of the English use. It needs to be outlined at this point, however, that to understand the origin of the «use», the predecessor to the trust, the cornerstone of equity and later of the common law and of capitalist development, one needs to explore the complex history of the use in its ecclesiastical origin.<sup>12</sup> To understand, in turn, the ecclesiastical origin of the use it is further also necessary to understand the

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<sup>8</sup> EARL JOWITT & CLIFFORD WALSH, *Jowitt's Dictionary of English Law*, 2<sup>nd</sup> ed., London, Sweet & Maxwell, 1977, p.1836.

<sup>9</sup> *Ibid.*, p. 1837.

<sup>10</sup> *Ibid.*

<sup>11</sup> ROBERT EDGAR MEGARRY & WILLIAM R. WADE, *The Law of Real Property*, 4th ed., London, Stevens & Sons Ltd., 1972/1975, p. 152.

<sup>12</sup> See FREDERICK POLLOCK & FREDERIC W. MAITLAND, *The History of English Law before the Time of Edward I*. Reprint of 2nd ed., S.F. Milsom, ed., Indianapolis, Liberty Fund, 2010, v. 2. c. V.

semi- and pre-ecclesiastical uses of the use in medieval times. It is only later that uses in England can be further distinguished between temporary and permanent uses, loosely conceived initially and more definitively conceptualised later in common law as licit and illicit uses, and even later transformed into legal (equitable and common law) rights through the restructuring of the divisibility of ownership. It is worth remembering, as Seipp notes, that: «Lawyers in England got along for about two centuries, from 1290 to 1490 or so, without using any single term that had the scope, application and explanatory power that later lawyers found in the words «property» and «ownership».»<sup>13</sup> The transition or transformation between the extra-legal and the legal uses remains for us a historical and conceptual field of significant complexity with wide consequences for historical and theoretical work in the field of land law and much more remains to be studied than we can outline in this work.

## 2. FRAGMENTS OF THE TRANSMISSION OF THE POVERTY DISPUTE IN ENGLAND

In terms of local awareness in England of the famous poverty dispute, so renowned on the continent, we know that appearing before John XXII who reopened the question as to poverty during the first quarter of the fourteenth century, were two Franciscans from England who became respondents in the debate that ensued. They were Richard Conington, the provincial minister of the English Order and one of Duns Scotus' respondents, and Walter Chatton, the Franciscan inceptor at Oxford. The two friars responded to the pope's arguments in: the *Responsiones fratris Ricardi de Conyngtona ad Rationes papales que ponuntur in illo statuto Ad Conditorem canonum* and the *Tractatus de paupertate evangelica*, respectively.<sup>14</sup> If we add this to the fact that the friars themselves were, while in England, well informed of the continental disputes and developments, as well as the fact that the clergy in England were well versed in canon law and civil law (which would later be weaved into the ecclesiastical exercise of jurisdiction and

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<sup>13</sup> SEIPP, *op.cit.*n.13, p. 31.

<sup>14</sup> See VIRPI MÄKINEN, *Property Rights in the Late Medieval Discussion on Franciscan Poverty*, Leuven, Peeters, 2001, pp. 144-50.



even later to the interventionism of the court of Chancery) there was at least the potential influence for the disputes on English shores to have a wider influence.

It is worth noting that while the mendicant controversies were not early on extensively discussed early on in England, this changed considerably in the late fourteenth century when Richard FitzRalph campaigned against the ecclesiastical endowment and, to an extent, against the mendicant orders (in particular the friars).<sup>15</sup> FitzRalph (Archbishop of Armagh, 1348-1360) was a preeminent master of theology at Oxford and briefly the Chancellor of the University (1332-1334).<sup>16</sup> It is not the place here to examine FitzRalph's work in detail, yet a brief excursus on his main arguments is instructive regarding the situation of the poverty controversy in England during this time. In the preface to his final work, *De Pauperie salvatoris*, FitzRalph describes how Clement VI appointed a commission, with himself included, to study the poverty question and to find an appropriate compromise between the decretals of Nicholas III and John XXII. The commission was appointed c. 1350; William of Ockham, it should be noted, had died the previous year. It is also worth noting that this took place during a time of rising anti-mendicant positions in England, evidenced, for instance, by the writs issued against the orders of Edward III in 1349-50. The Commission's work, however, was fruitless, reaching no conclusion, as a result of which FitzRalph began to produce his long dialogue *De Pauperie salvatoris*, which he would complete by 1356 and dedicate it to Innocent VI.<sup>17</sup>

FitzRalph's strategy is mixed. He sympathetically accepts that the friars are bound by their vow of poverty and thus also accepts simple use, while at the same time using this argument against them in order to exclude them from pastoral office. FitzRalph begins Book I with an examination of the terms of the dispute: *dominium, proprietatem, possessionem, ius utendi et usum*. For him divine dominium defines God's inalienable lordship over creation which is not

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<sup>15</sup> See CAROLLY ERICKSON, *The Fourteenth-Century Franciscans and their Critics*, «Franciscan Studies», 35 (1975), pp. 107-35; See also JANET COLEMAN, *FitzRalph's Antimendicant 'Proposicio' (1350) and the Politics of the Papal Curia at Avignon*, «Journals of Ecclesiastical History», 35 (1984), pp. 376-90. A more detailed account of the polemics is provided in KATHERINE WALSH, *The De Vita Evangelica of Geoffrey Hardeby, O.E.S.A. (c.1320-c.1385): a study in the mendicant controversies of the fourteenth century*, «Analecta Augustiniana», xxxiii (1970), pp. 151-261 (repr. Bibliotheca Augustiniana: Nova Series, Sectio Historica, iv, Institutum Historicum Augustinianum, Rome, 1972).

<sup>16</sup> See AUBREY GWYNN, *Archbishop FitzRalph and the Friars*, «Studies: An Irish Quarterly Review», 26 (101) (1937), pp. 50-67.

<sup>17</sup> *De Pauperie salvatoris* consists of eight books, the first four of which can be found as an appendix to R.L. Poole's edition of John Wyclif's *De Dominio Divino*, London, 1890, while books V-VI can be read in R.O. Brock's *An Edition of Richard FitzRalph's 'De Pauperie salvatoris'* (unpublished doctorate thesis, University of Colorado, 1954). The eighth book was written later in response to the arguments advanced against the work and was published in 1356. The final book can be read in Corpus Christi College MS 180.

diminished by the allotment of post-lapsarian human *dominium*. Adamite *dominium* partook in the original *dominium* of divine omnipotence since it is a part of it, but Adam held only the right of a creature of reason to «possess and use what is naturally subject to him.»<sup>18</sup> In the pre-lapsarian state, Adam received *dominium* as a privilege in being the image-bearer of God. In the post-lapsarian condition *dominium* is tied, for FitzRalph, to righteousness which remains imperfect but is necessary. Original *dominium*, however, co-exists in the post-lapsarian state of human beings with its limitation (*quidam titulus naturalis licet deformat ad usum rerum*).<sup>19</sup> In Book III, FitzRalph argues that possession is the sign of *dominium*, while use is its end in the post-lapsarian state. *Dominium* is placed in both the original and post-lapsarian states with the differentiation that had Adam not sinned the exercise of lordship over nature would have remained equal to all and non-coercive. Use is the *fructus* of *dominium* but it cannot be exercised in the post-lapsarian state without rational limitation.

While property (*proprietas*) for FitzRalph may be an «accident» or acquired right to possession and use, *dominium* can never be relinquished (if one relinquishes political or civil *dominium*, like the friars did, then one retains original or natural *dominium* as a matter of necessity). Natural *dominium* is necessary, civil *dominium* is only determined *de facto* as a limitation and as a result natural law in times of necessity prevails over civil law. Juridical *dominium*, including that of the Church, is collateral of the admixture of grace with sin. In all this, and especially in Book VI, FitzRalph maintains that original *dominium* cannot be dependent on political and juridical limitations or jurisdictions and finds himself in agreement with the friars' doctrine of *altissima povertà*, which aimed to return to the freedom of the natural state.<sup>20</sup> FitzRalph's central argument against the Franciscans is that while they are right in practicing absolute poverty, they have betrayed such a practice by accepting the legal fiction of papal *dominium* (under Nicholas III) over whatever they use. In arguing thus he sides with John XXII's renunciation of the fiction. The point of the doctrine of highest poverty, after all, was that it would be an ethical reality, rather than a legal fiction. The detail in FitzRalph's argumentation concerning the comparison of the Bulls of Nicholas and John in Book VI is highly interesting, but cannot be examined here in an

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<sup>18</sup> «[...] *rationalis creature mortale ius sive auctoritas originalis possidendi naturaliter res sibi natura subiectas conformiter rationi, et eis plene utendi sive eas tractandi.*» (*De Pauperie salvatoris*, ii.2).

<sup>19</sup> (*De Pauperie salvatoris*, ii.20).

<sup>20</sup> «*Et ita consequitur quod in habente artissimam paupertatem nullum remanet civile dominium nec utendi aliquod ius civile nec aliqua civilis possessio, cum hec omnia possint a voluntate libere abici. [...]*» in *De Pauperie salvatoris*, vi.16; and FitzRalph will add later as to the *altissima povertà*: «*Hanc igitur pauperiem observantes a nostre nature ingenuitate primaria non recedunt, sed rupto federe inter carnem et spiritum ex originali peccato et per ipsum nuto ac firmato gracie originalis legibus se coaptant.*» ; *ibid.*, vi.17.

extensive manner. Nonetheless, it is worth mentioning his view on *simplex usus facti* when he argues that the reason why John objected to this term was not, in FitzRalph's view, because it aided their abdication of all rights, but because John wanted to safeguard the Franciscan's right of use in natural law (which by implication would survive the denunciation of civil rights). The end result of FitzRalph's argumentation is, arguably, that he sees the Franciscans as devoid of a right to pastoral privileges and jurisdiction, yet able to retain the *de facto* legitimization of poverty as a way of life. In the meantime, the Church is viewed as capable of combining its corporate property with both the grace of original *dominium* and with the limitations of civil *dominium* (a position which Wyclif would take further in denouncing the endowed Church).<sup>21</sup>

It is worth adding the position of Uhtred of Boldon, who succeeded FitzRalph at Oxford, given that following on from FitzRalph's anti-mendicant position, Uhtred's shows that the late fourteenth century attack on the Church's endowments was closely linked to the secular-mendicant conflicts in the continent.<sup>22</sup> It is probably correct to suggest that without FitzRalph's polemic the controversy over poverty would not have surfaced in as substantial a manner as it did. Uhtred forms the missing link between the old anti-clericanism of FitzRalph and the new anti-clericanism of Wyclif<sup>23</sup> as well as the respondent to the counter-arguments to those of FitzRalph as advanced by Franciscans like John Hilton and William Jordan.<sup>24</sup> Uhtred's position is equally complex to that of FitzRalph in he too attempted a synthesis or reformulation of the Aegidian doctrine (following Giles of Rome) and the apostolic poverty doctrine held by the Friars.<sup>25</sup> In *De dotacione ecclesiae* Uhtred supports the Franciscan doctrine by referring to Numbers 35 in the following way: «From this it seems to follow that the Levites did not have those cities as lords, but only to inhabit and to sustain their cattle, because when the Lord determined to give

<sup>21</sup> See JOHANNIS WYCLIFFE, *De Dominio Divino*, ed. R.L. Poole, ed., London, 1890 (repr. New York, 1966). See also MALCOLM D. LAMBERT, *Medieval Heresy: Popular Movements from the Gregorian Reform to the Reformation*, 2<sup>nd</sup> ed., Oxford & Malden, Blackwell Publishers, 1992 and MICHAEL WILKS, *Predestination, Property and Power: Wyclif's Theory of Dominion and Grace*, «Studies in Church History», 2 (1965), pp.220-36.

<sup>22</sup> See ARNOLD WILLIAMS, *Relations between the Mendicant Friars and Secular clergy in England in the Later Fourteenth Century*, «Annuaire Medievale», 1 (1960), pp. 22-95. On the surviving works of Uhtred see MILDRED ELIZABETH MARCETT, *Uhtred de Boldon, Friar William Jordan and Piers Plowman*, New York, 1938, pp. 68-75.

<sup>23</sup> See KENNETH BRUCE McFARLANE, *John Wyclif and the Beginnings of English Nonconformity*, London, Penguin Books, 1962/1972. See also HERBERT B. WORKMAN, *John Wyclif: A Study of the English Medieval Church*, Oxford, Clarendon Press, 1926 (repr. Hamden, Conn. 1966).

<sup>24</sup> See GEOFFREY L. DIPPLE, *Uhtred and the Friars: Apostolic Poverty and Clerical Dominion Between FitzRalph and Wyclif*, «Traditio», 49 (1994), pp. 235-58.

<sup>25</sup> Uhtred's two key works of relevance here *De dotacione ecclesie* and *Contra garrulous dotacionem ecclesie impugnantes* were consulted from the typescript in C.H.THOMPSON, *Uhtred of Boldon, a Study in Fourteenth-Century Political Theory*, Unpublished Doctorate Dissertation, Victoria University, Manchester, 1936, part II. See also WILLIAM A. PANTIN, *Two Treatises of Uhtred of Boldon on the monastic life*, in R.W.Hunt, et al., eds., *Studies in Medieval History presented to Frederick Maurice Powicke*, Oxford, Clarendon Press, 1948, pp. 363-85.

those forty-eight cities to the Levites, He added «to inhabit».<sup>26</sup> Utilizing this position, Uhtred stressed the inalienability of ecclesiastical dominion in order to link it «with Franciscan claims to live by simple use»<sup>27</sup> Dipple writes, in addition, that: «Ecclesiastical dominion then, in some way, represents and participates in divine, original dominion.»<sup>28</sup> Uhtred distinguishes between two forms of «having» in order to establish his position. By the first «original» form of having in the state of nature or innocence, Christ and the Apostles have nothing of their own, while by the second form of having, they have personal *dominium* under the guise of *oikonomic* stewardship or management, which yet has to be shared in times of necessity. Arguably the two are not portrayed in the end as mutually exclusive even though «having» in the state of innocence and «having» in civil law are separable, as Dipple comments:

[...] ecclesiastics may be endowed with worldly wealth, yet keep their hearts detached from it and therefore remain true followers of Christ. Uhtred does not let the matter stand thus. He relates the detachment from the world of the true followers of Christ back to the alienation from the world of consecrated ecclesiastical property.<sup>29</sup>

Yet for Uhtred all clerical *dominium* was spiritual or original and therefore not partaking in civil *dominium* and as such it should not entertain any claims of civil rights to property. The Church can have only spiritual property that is detached from or dead to the world.<sup>30</sup> In this regard, it is the holding under office that becomes a key argument in Uhtred. Uhtred argues that Church properties are held under offices, rather than personally, as a result of which the clergy are merely *oikonomic* administrators of wealth, using property rather than owning it (*dominium* remained with Christ). With this unexpected application of the Franciscan doctrine to the endowment of the Church in England, Uhtred exemplifies one of the many instances of not only awareness of the continental disputes but also the collateral and extensive consequences of this awareness.

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<sup>26</sup> «ad habitandum» in fol.72.

<sup>27</sup> See DIPPLE, *op.cit.n.24*, p. 250.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*: 251. Today, when private banks' property (and as a consequence debt) seems to be considered as in need of higher protection than that of States, the argument appears to be quite similar. The private banks are able to detach their «hearts» from their worldly wealth in order to remain true followers of capitalist accumulation, while States are not able to do so in their post-lapsarian predicament.

<sup>30</sup> See *Contra garrulous*, fol.101. See also the analysis in DIPPLE, *op.cit.n.24*, pp. 254-5.

### 3. THE FRANCISCANS IN ENGLAND: *AD OPUS ET AD USUM*

It is now time to return to the reception and adaptation of Franciscan thought in England. The arrival of the Friars in England is described in the *De adventu fratrum minorum in Anglie* of Thomas «of Eccleston», completed sometime in 1258-59.<sup>31</sup> Thomas, of Eccleston (the surname is a sixteenth century addition), joined the order sometime before 1232. The nine friars arrived at Dover on 10<sup>th</sup> September 1224 under the guidance of Agnellus of Pisa and five of them went to Canterbury, while the rest went on to London.<sup>32</sup> Two of the group that went to London continued to Oxford a year later. Maitland writes with regard to the Franciscan utilization of the use in England:

In the early years of the thirteenth century the Franciscan friars came hither. The law of their being forbid them to own anything; but they needed at least some poor dormitory, and the faithful were soon offering them houses in abundance. A remarkable plan was adopted. They had come as missionaries to the towns; the benefactor who was minded to give them a house, would convey that house to the borough community «to the use of» or «as an inhabitation for» the friars. It is an old doctrine that the inventors of «the use» were «the clergy» or «the monks». We should be nearer the truth if we said that, to all seeming, the first persons who in England employed «the use» on a large scale were, not the clergy, nor the monks, but the friars of St. Francis.<sup>33</sup>

When Eccleston describes the question of how the friars would enable the observance of their vow of poverty in order to live as strangers he writes that in Oxford, for instance (though similar arrangements were made in London and Canterbury), Richard the Miller established a

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<sup>31</sup> See *De adventu Fratrum Minorum in Angliam: the Chronicle of Thomas of Eccleston* A.G.Little, ed., Manchester, Manchester University Press, 1951, p.xxii.

<sup>32</sup> CHARLES L. KINGSFORD, *The Grey Friars of London*, Aberdeen, The University of Aberdeen Press, 1915, p. 15.

<sup>33</sup> FREDERIC W. MAITLAND, *The Origin of Uses*, «Harvard Law Review», 8 (1894), pp. 127-137: 130.

compound for them by giving it to the people of the municipality of Oxford to hold *ad opus fratrum* (that is, for their use).<sup>34</sup>

DeVine, in his recent attentive investigation of the manner in which the friars could have received such a compound without disobeying their vow of poverty, suggests that there were three possibilities available. First, the Friars could have the compound *ad opus* where the people of Oxford could be seen as feoffees holding for the friars' benefit (*cestuis*) under the instruction of the feoffor (Richard the Miller). The early use had as its primary meaning «benefit» and is said to be derived from *ad opus* (*ad opus meum, tuum, seum* meaning on my behalf, or yours, or his) which in old French became *oes, os* or *ues* and which was arguably then fused with the term «use». *Ad opus* and *ad usum* were, in fact, often seen as interchangeable, written in the full formula of *ad opus et ad usum*. Much is made of the difference between the derivation of the term use in England and the Franciscan understanding of the Latin *usus*. In that, however, the Franciscans were employing the Latin term *usus*, partly from Roman and canon law, it is worth noting that they were not only inventing the notion of *simplex usus facti* (simple use as a matter of fact) but were also utilizing the term use in a factual and literal, rather than juridical, sense. As such the differentiation between the early customary use in England and the anti-juridical notion of *simplex usus facti* by the Franciscans appears, at least to an extent, exaggerated (by scholars, for instance, such as Maitland and his later followers). This does not mean that the English use and the Franciscan use are of identical origin whether in terms of customary practice or juridical and even etymological derivation, but their conceptual affinity is plausible. Furthermore, while the *ad opus* use was available during this time, the Franciscans were not necessarily the originators of such uses which are already reported prior to their arrival in the 1220s -but they were possibly their most prominent recipients.<sup>35</sup>

Feoffment is the act of investing one with possession or the instrument used to achieve this. DeVine writes that:

The feoffment to uses or «use» arose as a pragmatic reaction to the feudal «incidents», the common law rule against devises of freehold, the rule against alienation by substitution

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<sup>34</sup> (*De adventu*, 22). See also FREDERICK POLLOCK & FREDERIC W. MAITLAND, *op.cit.n.12*, pp. 228-9. See also STEPHEN DeVINE, *The Franciscan friars, the feoffment to uses, and canonical theories of property enjoyment before 1535*, «The Journal Of Legal History», 10.1 (1989), pp. 1-22: 2.

<sup>35</sup> See JOHN L. BARTON, *The Medieval Use*, «Law Quarterly Review», 81 (1965), p. 565. See also DeVINE, *op.cit.n.34*, pp. 8-9.

without purchase of a license, the prohibition of gifts of freehold into mortmain, and the rules of primogeniture, all of which suited the needs of a feudal monarch better than those of the remainder of medieval English society.<sup>36</sup>

Holdsworth claimed to have found evidence of feoffments to uses in late twelfth and early thirteenth centuries in records of conveyances against the prohibition of devises,<sup>37</sup> providing a *de facto* devisability of freehold: whereby technically the freehold did not change hands.<sup>38</sup> In fact, *cestuis* under uses had no enforceable rights at common law against feoffees, except if in breach of a condition of the enfeoffment, where the *cestui* was the original feoffor.<sup>39</sup> As such the use «skirted these legal facts and rules but did not violate them: it was extra-legal, not illegal.»<sup>40</sup> in this manner legal title to land and beneficial enjoyment of the land could be separated (the holder of the latter, the *cestui que use*, had neither enforceable rights, nor remedy in the common law courts and so was often described as «the greatest stranger in the world» which would appear at least to fit well with the friars' self-description as strangers).<sup>41</sup>

Thus, it is necessary, at this point to allow for another excursus before we consider DeVine's other two possibilities, in order to place the device of feoffment to uses into its historical, social and legal context.<sup>42</sup> The feoffment to uses lies at the heart of the early attempts to divide legal and beneficial ownership, which would become so characteristic of the common law's

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<sup>36</sup> STEPHEN W. DeVINE, *Ecclesiastical Antecedents to Secular Jurisdiction Over the Feoffment to the Uses to be Declared in Testamentary Instructions*, «American Journal of Legal History», 30 (1986), pp. 295-320.

<sup>37</sup> WILLIAM HOLDSWORTH, *A History of English Law*, London, Methuen, 1924-6, v.III, pp. 414-5. For general examples of conveyances in Medieval England see JOHN M. KAYE, *Medieval English Conveyances*, Cambridge Studies in English Legal History, Cambridge, Cambridge University Press, 2008.

<sup>38</sup> St. German's *Student* confirms this three centuries later: «sometime suche vses be made that he/to whose vse & c. may declare hys wyll thereon...»; CHRISTOPHER ST. GERMAN, *Doctor and Student, Dialogue 2*, c. xxii, 91 Selden Society, T. Plucknett & J. Barton, ed., 1975, p. 224. It is worth noting that St. German's *Student* shows knowledge of continental divine and natural laws, while noting that these are not for the lawyers to discern; and also that St. German, who introduced the later generations of law students to his *lex proprietatis* in the abstract, based his explicatory narrative as to its origin and justification on the common, for the continental traditions, creation theory, whereby originally private property was not necessary but only a post-lapsarian institution. See the discussion in SEIPP, op.cit.n.13, pp. 76-7. Earlier John Fortescue had argued along similar lines in JOHN FORTESCUE, *De Natura Legis Naturae*, in *The Works of Sir John Fortescue*, Thomas Fortescue, Lord Clermont ed., London, 1869/1461-3, pp. 149-50. For Fortescue natural law: «imposed limits on the legitimate power of the king to appropriate the property of individuals». See *ibid.*: 26-7 and the analysis in SEIPP, op.cit.n.13, pp. 79. Later Coke would repeat the creation narrative in EDWARD COKE, *The First Part Of The Institutes Or, A Commentary Upon Littleton*, London, 1628, p. 116b. When Coke distinguishes temporal laws as to property in land and goods he draws a threefold categorisation between *jus proprietatis*, *possessio* and *possibilitas*, *Ibid.*, p. 145b.

<sup>39</sup> See JOHN BAKER, *An introduction to English Legal History*, 2<sup>nd</sup> ed., London, Butterworths, 1979.

<sup>40</sup> DeVINE, op.cit.n.36, p. 295.

<sup>41</sup> See, for instance, *Dod v Chyttynden*, Caryll's Reports 15 Hen.7, pl.258, 116, SS. 392, 396 (C.P. 1502) per Serjeant Frowyk.

<sup>42</sup> See DeVINE, op.cit.n.42.

description of the system of estates in land with the creation of new legal and equitable interests. It is important to keep in mind, here, that the early seeds of this fairly contingent and later strategic distinction are to be found not in legal thought «but in miscellany of factual situations requiring recognition in conscience if not in law»<sup>43</sup> Thus, Fratcher argues, the use became common only after the Franciscans arrived in 1224.<sup>44</sup> Fratcher explains further:

The friars needed hospitals and poor houses for their ministry to the poor, the sick and the aged in towns. They met their needs by having land conveyed to municipal corporations to the use of the friaries. (...) Because the ordinary method of conveying land was by feoffment, a person who conveyed land to uses was known as the feoffor, the person to whom he conveyed as the feoffee to uses, and a person for whose benefit the use was created as a *cestui que use*.<sup>45</sup>

Initially a feudal tenant was considered to be bound in person, holding *ad commodum* or *ad opus*, to enable and protect the beneficial enjoyment by another of land vested in their name. This was not from the start a technical legal concept. It applied also to bailiffs and guardians who had to undertake the custodial care over another's property (*custodire*) or *ad opus*.<sup>46</sup> By analogy, the tenant's obligation would be understood through a splitting of the title as recognized by law and the beneficial enjoyment as recognized de facto. The law could only recognize one right -that of the feudal tenant- while the beneficial enjoyment *ad opus* was only recognizable as either a factual situation or as a state of necessity. The earlier situations in which land was held *ad opus* arose because a tenant wished to alienate their land by substitution through surrendering their interest to the lord on trust until a new tenant would be admitted. Another situation involved «the case where a man wished to transfer property into the names of himself and his wife, or to settle property on himself and his heir»<sup>47</sup> Since they would be able to grant the land directly to himself, they would grant the land to a friend on trust temporarily. When such arrangement

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<sup>43</sup> BAKER, *op.cit.*n.39, p. 248.

<sup>44</sup> See JOHN R.H. MOORMAN, *The Franciscans in England*, Oxford, Oxford University Press, 1974. See further JANE E. SAYERS, *Papal Government and England during the Pontificate of Honorius III (1216-1227)*, Cambridge, Cambridge University Press, 1984. See also ANDREW G. LITTLE, *The Grey Friars in Oxford*, Oxford, 1891 and CLIFFORD H. LAWRENCE, *The English Church and the Papacy in the Middle Ages*, New York, Fordham University Press, 1965 and also *id.*, *The Friars: The Impact of the Early Mendicant Movement on Western Society*, London, Longman, 1994; JANET E. BURTON, *Monastic and Religious Orders in Britain, 1000-1300*, Cambridge, Cambridge University Press, 1994 and ROSALIND B. BROOKE, *The Coming of the Friars*, London, Allen & Unwin, 1975.

<sup>45</sup> WILLIAM F. FRATCHER, Uses of Uses, «Missouri Law Review», 34 (1969), pp. 39-66: 40.

<sup>46</sup> BAKER, *op.cit.*n.39, p. 248.

<sup>47</sup> BAKER, *op.cit.*n.39, p. 248.



became permanent, Baker notes, the beneficiaries of the *ad opus* mechanism were mostly the Franciscans from 1225 onward.

The well-known land holding arrangements after the Norman Conquest in 1066 need to be kept in the background of this discussion. Most of the land was granted by William the Conqueror to earls and barons who as tenants-in-chief of the Crown required to raise military forces for the King and functioned as his Great Council (later to become the House of Lords). As Fratcher writes, the holding of public office and its conjunction with such tenancies along with the subinfeudation of some of the lands they held to sub-tenants (to support the overlords with their royal duties and expenses), followed by the further subinfeudation by such subtenants to working farmers, increased the complexity of the lords' land holding. Moreover the precarity of the tenure of public office and land by tenants-in-chief, who could be deprived of office or die while commanding royal forces led to a need to form transfer methods for holding the lands in question, lands which the tenants-in-chief held as under terminable life estates.<sup>48</sup> In the early thirteenth century, when land was granted to a tenant and his heirs (the sub-tenant holding an estate in fee simple), the tenancy passed to his heir after his death, upon payment of monetary relief to the overlord. The overlord, in similar circumstances, would pay a year's profits to the King. Direct male heirs were the only ones considered suitable and all other descendants of a deceased tenant were excluded under the auspices of the King's Court.

Fratcher notes, crucially:

Rural land could not be devised by will, so the tenant was unable to avoid escheat [i.e. the passing of an estate by escheat to the overlord when no eligible heir existed; *author's addition*] by this means or to make provision for his wife, his parents, or his daughters and younger sons. If the heir of a tenant by military service was a minor, the overlord was entitled by virtue of the feudal perquisites of wardship and marriage, to: (1) possess the land and the heir during his minority; (2) keep the rents and profits which accrued during this period; and (3) control the marriage of the heir, which meant, in practice, to demand a large sum for consent to a suitable marriage.<sup>49</sup>

Seipp, in his recent overview of the early common law history in relation to fiduciary duties and the trust, writes:

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<sup>48</sup> FRATCHER, *op.cit.*n. 45, p. 41.

<sup>49</sup> *Ibid.*, 42

A dying landholder could not leave land by will to whomever he or she wanted (except in the city of London and some English Boroughs by special local customs), but was forced to let it descend to the eldest male heir. If an heir to land at the high social level called knight service was under the age of twenty-one, the feudal lord of the heir took the heir and the land into wardship.<sup>50</sup> Wardship permitted a lord who provided a reasonable maintenance for the heir to keep all the profits from the heir's land until the heir turned twenty-one. Wardship was thus a tremendous financial windfall to lords who otherwise were left to fixed feudal services or rents that over time had become hardly worth collecting. (...) But the lord collected these valuable rights only if the land was inherited from the dying tenant, not given away during his life.<sup>51</sup>

The Statute of Westminster in 1290 rendered a prohibition of further subinfeudations while allowing tenants in fee simple to convey their land *inter vivos* by way of substitution, replacing the immediate tenant and being subject to the very same obligations to the overlord.<sup>52</sup> As Baker writes: «Before 1290, the lord could have refused his consent to any feoffment [i.e. a grant in fee simple, *author's addition*] which prejudiced his own interests; but the *Quia Emptores* ended seigniorial control over such arrangements.»<sup>53</sup>

This however, due to a number of severe limitations, could only be used for making family settlements and wills.<sup>54</sup> The one available method of the transfer of a possessory estate (in fee simple) at the time was by feoffment with livery of seisin, which required a formal ceremony on the land in question. This was often impractical and, given its nature, restricted to present transactions (and not any kind of future arrangements).<sup>55</sup> The case of *Fitz William v Anonymous* details that in 1305 it had become possible for a tenant in fee simple to convey an estate in remainder to become possessory in the future, as long as he also conveyed the present possession right simultaneously.<sup>56</sup> However it was not possible to make this conveyance to the unborn or one's wife. Baker writes:

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<sup>50</sup> Chapter Six of the *Statute of Marlborough* (53 Hen 3) in 1267 rendered arrangements that attempted to escape the wardship invalid unless they were feoffments in good faith.

<sup>51</sup> SEIPP, *op.cit.*n.5, p. 1014.

<sup>52</sup> (III, *Quia Emptores Terrarum*, 18 Edw. I, Stat. 1).

<sup>53</sup> BAKER, *op.cit.*n.39, p. 249.

<sup>54</sup> FRATCHER, *op.cit.*n. 45, pp. 42-3.

<sup>55</sup> *Ibid.*, p. 43.

<sup>56</sup> (R.S.Y.B. 33 Edw. 1, 20, 1305).

The feoffees then held the title solely to the use of the feoffor. Whatever he directed, they were expected to obey. This was very convenient to the feoffor. He remained the absolute owner in effect, because he continued to possess the land for his own benefit and take the profits, and he could sell the fee whenever he wished by directing the feoffees to convey to his purchaser. Yet he could in addition, if he so wishes, defer the selection of his successors to the point of his own death. Thus the landowner achieved the power of disposing of the land by last will or by *inter vivos* conveyance, as he pleased. It was this attribute of the holding *ad opus*, the permanent arrangement giving the beneficial owner the power to devise without impairing his other powers, which principally assured its establishment as a common institution. It also ensured that the device had to be a mere trust, because the object of a will was necessarily to disinherit the only person capable of enforcing a condition.<sup>57</sup>

It was this permanent institution that Baker states was called «a use» from the law French word for *opus* (derived via the old French *oepe* which, for Baker, has no connection with the word use).<sup>58</sup> As Baker describes: «the trusting of feoffees with lands to be held in use was a fact of life long before it had any legal consequences. The common law took no notice of mere trusting, without a condition.» Feoffment to uses became, hence, as a semi-legal mechanism, reaching wide popularity for the first time during the reign of Edward III (1327-1377).

One way to avoid a feudal incident was the transfer of bare legal title. In the 1320s bare legal title could be transferred to a small group of persons (usually three in number who would hold in joint tenancy with right of survivorship), who while holding the land in subordination to the feudal lord would hold it for another (the original landholder) so that in this way he would avoid feudal incidents (wardship, marriage). This would provide for the exceptional allowance, for instance, for a spouse, daughters and sons to be provided for beyond the common law limitations.<sup>59</sup> The same applied if a landholder wished to pass land to the Church upon his death and thus escaping the necessity of purchasing a costly licence from the King, a necessity imposed by the Statute of Mortmain (1279).<sup>60</sup> Since the Church never died the land was said to

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<sup>57</sup> BAKER, *op.cit.*n. 39, p. 250.

<sup>58</sup> *Ibid.*

<sup>59</sup> See SEIPP, *op.cit.*n.5, pp. 1014-5. See also JOSEPH BIANCALANA, *The Medieval Use*, in R. Helmholz and R. Zimmermann, eds., *Itinera Fiducia, Trust And Treuhand In Historical Pespective*, 1998, p. 111.

<sup>60</sup> See SANDRA RABIN, *Mortmain Legislation and the English Church 1279-1500*, 1982, pp. 29-30.

never have left the «*mortmain*» (dead hand).<sup>61</sup> As we have seen earlier the standard terminology for such arrangements was feoffment to uses (long before the courts of Chancery and the Common law would employ the concept) and the effect of such an arrangement was that in this manner legal title and beneficial enjoyment could be separated.<sup>62</sup> Since the feoffees were bound by ties of conscience resort to the ecclesiastical courts became more popular at least as far as wills were concerned. What the earliest interventions by the Court of Chancery were over uses is not certain but they have been argued to have been from the latter part of the fourteenth century.<sup>63</sup>

During the two centuries following the Norman Conquest land holdings were increasingly detached from the tenure of public office and stood as beneficial ownership; the administration of the Kingdom and the conservation of the peace was gradually bureaucratized. This was the context within which: «landowners made feoffments to uses in order to protect themselves and their families against the gross injustices of a system of land law which was centuries out of date.»<sup>64</sup> In this way they could provide for their families and also avoid the abuses resulting from wardship and marriage, and not as it was for centuries commonly suggested, in order to commit fraud or evade taxation. Until the mid-fifteenth century the only legislative limitation to the growth of the device of uses came thus under a sequence of statutes that limited clerical uses and that prohibited the utilization of uses for purposes contrary to public policy (such as defrauding creditors).<sup>65</sup> Exemption from the Statute of Mortmain of 1279, which had provided for the possibility and power of forfeiture to the overlord of land conveyed to religious corporations was provided in the statute only by the means of a royal license in mortmain (which required both time and a certain cost). A century later the prohibition was extended to municipal corporations and to conveyances for anyone to the use of religious persons (in 1391).<sup>66</sup> We know that, at least, from 1502 the greater part of English land was held under uses.<sup>67</sup> As Baker writes:

By 1500 [...] the law of uses was beginning to percolate into the common-law courts as a result of a statute of 1484 [*Stat.1 Ric.III, c.1; B&M.101, author's addition*]. [...] To protect

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<sup>61</sup> Exemption was rendered possible only by means of an expensive royal licence. See *Statute of Mortmain* (7 Edw. I, stat.2, 1279), para.1. A century later the Statute was extended to conveyances to municipal corporations and to anyone to the use of religious persons (Stat. 15, Rich. 2, c.5, paras.4 & 7, 1391).

<sup>62</sup> See, for instance, *Dod v Chyttynden*, Caryl's Reports 15 Hen.7, pl.258, 116, SS. 392, 396 (C.P. 1502) per Serjeant Frowyk.

<sup>63</sup> See BARTON, *op.cit.*n. 35.

<sup>64</sup> FRATCHER, *op.cit.*n.45, p. 45.

<sup>65</sup> See FRATCHER, *op.cit.*n.45, n.37. As to the utilization of uses to avoid the claims of creditors, see *Langedon v Stratton* (1374), CPMR 1364-81, p.175.

<sup>66</sup> See FRATCHER, *op.cit.*n.45, p. 40.

<sup>67</sup> (Y.B.Mich. 15 Hen. VII, fo.13, pl.1), per Frowyk, sjt.

those who purchased from beneficiaries in possession, the statute provided that the beneficiary could pass a title good against his own feoffees. This remarkable measure enabled the beneficiary to convey something he did not in law have; he was treated by fiction as if he were the legal owner, for the purpose of conveying title. An important consequence was that the title to the use (the *jus usus*) was increasingly mentioned in common-law pleadings, so that questions related to the transfer of uses came before the common-law judges for determination. The beneficiary's interest was in this way assimilated to legal property concepts. It could be seen as a thing, a thing which descended to heirs on an intestacy, a thing which could be bought and sold or settled on a succession of beneficiaries. Nevertheless, the new kind of ownership was inherently foreign to the common law because it conflicted with the feudal system.<sup>68</sup>

It was in the fifteenth century that the beneficiary interest in question was transformed gradually to a new type of ownership which would later be understood as the equitable estate.<sup>69</sup>

It is important to understand another factor in order to appreciate the way uses were approached by the English court structure. That is, while until the twelfth century disputes between tenants-in-chief and the Crown were to be decided by the *Curia Regis* with the King himself presiding over proceedings, the eventual expansion of the jurisdiction of royal justice over almost all disputes over land meant that land dispute trials were delegated to the Court of Common Pleas through writs issued at the Chancellor's discretion under the Great Seal. In the later part of the thirteenth century such discretion was significantly limited in terms of issuing new writs, but the residual jurisdiction was delegated to the Chancellor, who in 1340 was recognized as the head of the distinct Court of Chancery (which was run by clergymen educated in civil law in England, Italy and France).<sup>70</sup> The Chancery jurisdiction over uses evolved more extensively only during the second quarter of the fifteenth century. Fratcher has argued that:

[T]o the limited extent that its jurisdiction and procedure permitted, the Court of Common Pleas recognized and enforced uses. [...] if a feoffment to uses was made on condition that, if the feoffee failed to perform his fiduciary duties to the *cestui que use*, the feoffor might enter the land and terminate the estate of the feoffee to uses, the Court of Common Pleas would enforce the condition. Such a condition could be enforced,

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<sup>68</sup> BAKER, *op.cit.*n.39, pp. 251-2.

<sup>69</sup> *Ibid.*, p. 251.

<sup>70</sup> See FRATCHER, *op.cit.*n.45, pp. 47-8.

however, only by the feoffor or his heir. As the commonest purpose of a feoffment to uses was to cut off the heir in favour of a daughter or younger son, this type of enforcement would be worse than useless to the typical *cestui que use* after the death of the feoffor. What the *cestui que use* needed was a procedure by which he could sue to compel the feoffee to uses to do his duty. This the Court of Common Pleas did not provide. It followed that, if there was to be such a remedy, it would have to be provided by the residual jurisdiction of the Council, exercised by or through the Lord Chancellor.<sup>71</sup>

By the end of the thirteenth century the rigidity of the law regarding landholdings had approached greater maturity, and the means of avoiding feudal incidents had been significantly, though not entirely, reduced not only by the Crown, but also the holders of large estates and the common law benches who subjected the granting of alienable land to strict rules in order to protect *seisin* of land.<sup>72</sup> By the last ten years of the fourteenth century, the authority of the Chancellor «to compel a feoffee to uses to convey land as directed by the will of the feoffors»<sup>73</sup> was established. By 1459: «the judges of the common law courts of King's Bench and Common Pleas recognized the powers of the Chancellor to compel feoffees to uses to perform their fiduciary duties.»<sup>74</sup> By the end of fourteenth century during Edward III's reign the court of Chancery had by and large stepped in: at common law the feoffees possessed the full legal estate, while in equity the rights of the *cestui que use* were enforceable.<sup>75</sup> Increasingly it was evident that the use device «was intended to give the *cestui que use* all the advantages of full ownership of the land, less some of the burdens of ownership, and with the additional power of devising his interest.»<sup>76</sup> Thus uses were used to escape the effects of political misfortune and the burden of feudal tenure. There were, indeed, numerous reasons and benefits for the utilization of the use given that, as Smith summarises:

(1) one could evade the feudal incidents of wardship, marriage and relief; (2) the law of forfeiture for treason and escheat for felony would have no application; (3) the mortmain

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<sup>71</sup> *Ibid.*, pp. 48-49.

<sup>72</sup> See the detailed analysis in DESMOND H. BROWN, *Historical Perspective on the Statute of Uses*, «Manitoba Law Journal», 9 (1978-9), pp. 409-433: 422. See also the meticulous account by A.W.BRIAN SIMPSON, *The Equitable Doctrine of Consideration and the Law of Uses*, «The University of Toronto Law Journal», 16.1 (1965), pp. 1-36.

<sup>73</sup> FRATCHER, *op.cit.*n.45, p. 50.

<sup>74</sup> *Ibid.*

<sup>75</sup> See *Dod v Chyttynden* (Caryll's Reports 15 Hen., 7, pl.258, 116 SS, 395-6, C.P. 1502). See also the commentary in SEIPP, *op.cit.*n.5, pp. 1021-2.

<sup>76</sup> FRATCHER, *op.cit.*n.45, p. 51.

statutes could be circumvented; (4) property could be lawfully hidden from creditors; (5) property could be transferred to aliens; and (6) a person could invest himself with a power similar to that of devising land.<sup>77</sup>

Placing the curtailment of uses in their wider jurisdictional and political context it is worth noting that the attacks in the sixteenth century on the legitimacy of the uses resemble, to an extent, the attack on *usus* by John the XXII. For instance, Thomas Audley wrote of the «untrue and crafty invention» of the uses which were maintained in the Chancery court «by the colour of conscience contrary to the study and learning of the common law, and contrary to reason, and also to the law of God.»<sup>78</sup> This culminated into the Statute of Uses in 1536, as amended in 1540 by the Statute of Wills, which declared that any holder of a *cestui que use* was the holder of a legal title of ownership in fee simple, ending the separation of land title and beneficial ownership -but interestingly rendering the use void while maintaining the feoffment as valid.<sup>79</sup> In order to defeat the Statute the ingenious device of «the use upon use» was later conceived, as well as the courts indicating that active trusts were not executed by the Statute.<sup>80</sup> It is also important to note that under in separating possession from use, possession did not denote physical occupation but «the element of title which before the Statute of Uses was vested in feoffees to uses».<sup>81</sup> It was possession in the hands of the feoffee to uses that the Statute attempted to address. Use in this sense was gradually transformed into a thing. As Coke wrote in the mid-seventeenth century:

[A] feoffee to the use of A. and his heirs, before the Statute of 27 H.8. for money bargaineth and selleth the land to C. and his heires, who hath no notice of the former use; yet no use passeth by this bargain and sale, for there cannot be two uses in esse, of one and the same land.<sup>82</sup>

<sup>77</sup> DAVID T. SMITH, *The Statute of Uses: A Look at Its Historical Evolution and Demise*, «Western Reserve Law Review», 18 (1966), pp. 40-63: 44.

<sup>78</sup> See JOHN H. BAKER and S.F.C. MILSOM, *Sources of English Legal History: Private Law to 1750*, Oxford, Oxford University Press, 2010/1986, p. 125.

<sup>79</sup> The *Statute of Uses* enabled legal title to pass automatically to the *cestui que use* and rendered all earlier feoffments to uses valid. The *Statute of Wills* authorised the devise of a large part of land in England rendered valid in law and also instituted a separate court of wards. On the *Statute of Uses* see: PERCY BORDWELL, *The Conversion of the use into a legal interest*, «Iowa Law Review», 1 (1935-36), pp. 1-49.

<sup>80</sup> On the latter see ANONYMOUS, *Brook's New Cases*, 94, 73 (Eng.Rep. 888, 1545).

<sup>81</sup> See NEILL G. JONES, *Uses, Trusts and a Path to Privity*, «Cambridge Law Journal», 56.1 (1997), pp. 175-200: 177.

<sup>82</sup> EDWARD COKE *On Littleton* [The First Part of the Institutes of the Laws of England. Or, a Commentary Upon Littleton. Not the name of the Author Only but of the Law Itself], Dublin, 14<sup>th</sup> ed., 1628/1791, p. 271b; see further the discussion in Jones, *op.cit.*n.81: 179. For the development of the concepts of the conjoined and the separated use in the case law see *ibid.*, pp. 179-200. From even earlier, as Pollock notes, the common law would characterize as a

In this manner, perhaps, the utilization and enforcement of uses and the related nascent powers of appointment would become the ground upon which the law of modern trusts and trustees' powers would be developed especially after the Statute of Uses.

The link and interaction between the ecclesiastical jurisdiction and the Chancellor is well put by DeVine:

In the sense of correcting a jurisdictional shortcoming of the ecclesiastical courts (as to *nudum pactum* feoffment to uses under the guise of a *fidei laesio*; *author's audition*), one which had permitted injustices towards *cestuis*, then, the Chancellor was using his awareness of the canon law and ecclesiastical court practice to build, on that ecclesiastical foundation, an improved and more adaptable equitable structure for doing justice in the secular realm. (...) the Chancellor was continuing an ecclesiastical form of justice, *epieikeia*, in the context of the feoffment to uses -a secular mechanism- in the forum best suited to the *epieikeia* function within the common law in an increasingly centralised and secularised society.<sup>83</sup>

As Coke had written earlier, while reason would see it as an impossibility, the Chancellor, in exercising the principle according to which *aequitas sequitur legem* in matters of descent, would declare that «the use ensued the nature of the land.»<sup>84</sup> The battle lines were drawn and the struggle between the Chancery and the common law adjudicators would be illustrated in the case of *Lord Dacre* in 1535.<sup>85</sup> For our purposes it will suffice to quote a characteristic passage from another case of the same year:

The use is nothing in law but is a confidence; the which trust might be broken, and for the same reason the use altered; for the common law doth never favour the use; for an use is not a right, nor is any action given in law, if a man be deforced of it, by which he may recover it; for it is an inconvenience and an impossibility in law, that two men

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wrong the conversion of the goods of another into someone else's use (*ad opus suum proprium*). See FREDERICK POLLOCK, *The History of English Law before the Time of Edward I*, reprint of 2nd ed., S.F. Milsom, ed., Indianapolis, Liberty Fund, 2010, v. 2, Ch. V.

<sup>83</sup> *Ibid.*: 306; Maitland can be seen to support this view in FREDERICK POLLOCK & FREDERIC W. MAITLAND, *The History of English Law*, 2nd ed., S.Milsom, ed., 1968, p. 232.

<sup>84</sup> COKE, *op.cit.*n.82, p. 13a.

<sup>85</sup> *Re Lord Dacre of the South* [Lord Dacre's Case], (Y.B. Pasch. 27 Hen. 8, pl.22, fol.7b. 7b-10a, Can. & Exch. Ch. 1535, 1535.026). Another work would be required for a detailed examination of the struggle between the courts during the sixteenth century and following the passing of the *Statute of Uses* up until the early 20<sup>th</sup> century. See on this ERIC W. IVES, *The Genesis of the Statute of Uses*, «The English Historical Review», 82.325 (1967), pp. 673-697.



(should have simultaneous, yet distinct, rights of ownership in the same undivided freehold).<sup>86</sup>

With regard to the conversion of the early use under the equitable jurisdiction of Chancery, Pollock provides the following summary which is worth quoting at length:

But at the time when the system of original writs was taking its final form «the use» had not become common enough to find a comfortable niche in the fabric. And so for a while it lives a precarious life until it obtains protection in the «equitable» jurisdiction of the chancellors. If in the thirteenth century our courts of common law had already come to a comprehensive doctrine of contract, if they had been ready to draw an exact line of demarcation between «real» and «personal» rights, they might have reduced «the use» to submission and assigned to it a place in their scheme of actions: in particular, they might have given the feoffor a personal, a contractual, action against the feoffee. But this was not quite what was wanted by those who took part in these transactions; it was not the feoffor, it was the person whom he desired to benefit (the *cestui que use* of later days) who required a remedy, and moreover a remedy that would secure him, not money compensation, but enjoyment of the land. «The use» seems to be accomplishing its manifest destiny when at length after many adventures it appears as «equitable ownership».<sup>87</sup>

From the fifteenth century on it becomes more common to describe the beneficiary as an owner, the early predecessor to the equitable estate.<sup>88</sup>

It is now time to return to DeVine's two other possibilities that were potentially open to the Friars with regard to the exemplary situation they encountered in Oxford. The second possibility, DeVine argues, is that the friars could have been «the beneficiaries of a Romano-canonical *usus* arrangement, such as was the custom in the continent.»<sup>89</sup> DeVine suggests that since the English use was available to them, as we saw above, and since it was to an extent equivalent to the Romano-canonical *usus* it is unlikely that they would opt for the continental type of *usus* instead, since under both devices they would receive the compound without any kind of ownership rights over it. The question here is of course which *usus*? This is important to

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<sup>86</sup> See *Abbot of Bury v Bokenham* (K.B. 73 Eng. Rep. 19, 26, 1 Dyer 8a, Trin. Hen. VIII, 1535), per Judge Fitzherbert.

<sup>87</sup> See POLLOCK & MAITLAND, *op.cit.*n.12.

<sup>88</sup> See BAKER, *op.cit.*n.39, p. 251.

<sup>89</sup> *Op.cit.*n.34, p. 2.

understand as the Franciscans would appropriate a particular understanding of *usus* through numerous argumentations borrowing both from medieval Roman law and canon law in order to propose that they were the beneficiaries of the so-called simple use of fact (*simplex usus facti*) in stark contrast to the ancient roman understanding of *usus*, as well as the canonical interpretations and Papal interventions of John XXII. The point DeVine makes here is reasonable. However, it does not preclude the possibility that the Franciscan invention of simple use of fact or factual use (as opposed to a right to use) could have been one inspiration (among others) for their adaptation to the English use which in its early customary use was not fully incompatible, (though it would be later as a semi- or fully fledged right). Ultimately, in any case we are in agreement with DeVine that the friars would have considered the legal arguments in question as «highly artificial» and also that whether they employed the *ad opus* use which was emerging in England at the time more widely, or the ideas of third party ownership from canon law, borrowing indirectly from Roman civil law, the important point is that they accepted a mere use arrangement in contrast to any ownership rights.<sup>90</sup> Finally, there is a third possibility we can note, following DeVine's syllogism: «the friars could occupy property as necessary without owning or having rights in it: the owner would simply let the friars occupy the premises without limiting his rights in any way.»<sup>91</sup> We shall return to this possibility in the penultimate section of this paper with regard to examining a particular legal case and its ramifications along the lines of all three possibilities that DeVine outlines. For now it is important to allow for another excursus into the numerous theories as to the origin of the English use as such which can help us contextualise even further the adaptation of the Friars to the English realm.

#### 4. THEORIES OF ORIGIN: ASSEMBLAGES OF INVENTION

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<sup>90</sup> *Ibid.*, p. 3.

<sup>91</sup> *Ibid.* DeVine refers here, for instance, to the example of the arrangement between the friars of Northampton and the Knight Richard Gobion, as quoted in *ibid.*, p. 3. Such arrangements were common in Assisi during Francis's lifetime.

Early writers proposed that the origin of uses and trusts was the Roman device of the *fideicommissum* (during the time of Emperor Augustus, 63 B.C-14 A.D.), which allowed persons to circumvent strict positive laws (*ius civile*) which did not permit certain persons from obtaining property by will, in order to respond to the demands of «natural equity». For example, it was initially the case that infants and non-Romans were not empowered to become beneficiaries of a legal testament.<sup>92</sup> Such a prohibition could be bypassed if the testator (by the *fidei commissa*) devised his property to a person who could stand as an heir subject (*haeres fiduciaries*) on condition that the property would be transferred to the incapable person, standing as a beneficiary (*fideicommissarius*). Under the *fideicommissum*: «[...] when a Roman Testator found that his prospective beneficiary was incapacitated to receive a testament, he transmitted to his legatee the intended legacy through a person capable of receiving[,] [...] trusting [...] that the legal beneficiary would honour his moral obligation and pass the legacy to the real beneficiary of the trust.»<sup>93</sup> The *fidei commissa* as a fiduciary bequest was, in fact, initially an extra-legal situation.<sup>94</sup> In effect, the device enabled another person (the *fideicommissarius*) who was legally capable of obtaining such property on the condition that he takes it in order to hand it to the person who could not. Eventually the device was recognized under the *ius civile* as is evident by the institution of the *Praetor fideicommissarius*.<sup>95</sup> It is worth noting that the so-called Roman origin theory of the trust entertained other potential sources, which included *fiducia* and *depositum*. We are not examining these in any significant detail here, but it is useful to note a few brief points as to these two Roman concepts. *Fiducia* entails a similar distinction between title and interest to the trust, but the debtor only had an *actio in personam*, and *fiducia* was rediscovered only at the early part of the nineteenth century and not before. In addition, the related concept of the *fiducia cum amico* resembles strong similarity with the device of the «spiritual friends» that, as we shall see below, was employed by the Franciscans in England as well as in the continent. The comparison with the *depositum*, in contrast, falls short on the proprietary character of the trust.

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<sup>92</sup> (I. 2. 23. 1).

<sup>93</sup> VINCENT R. VASEY, *Fideicommissa and Uses: The Clerical Connection Revisited*, «Jurist», 42 (1982), p. 201-29, p. 203.

<sup>94</sup> (I. 2.23.1 and Dig.36.1.48 and 69 and 3.)

<sup>95</sup> For a comparison with the Roman tradition, see DAVID JOHNSTON, *Trusts and trust-like devices in Roman law*, in R. Helmholz & R. Zimmermann, eds., *Itinera Fiducia: Trust and Treuhand in Historical Perspective*, Berlin, Duncker & Humblot GmbH, 1998, p. 45. The more general question of the link between the English trust and the traditions of *ius commune* remains a significant question that requires further study. See MATHIAS REIMANN, ed., *The Reception of Continental Ideas in the Common Law World (1820-1920)*, Comparative Studies in Continental and Anglo-American Legal History, v.13, Berlin, Duncker & Humblot, 1993.

The earliest proponent of the *fideicommissum*-theory of transplantation was probably Blackstone, tracing it to the final quarter of the fourteenth century when, he claims, continental ecclesiastics were utilising the Roman *fideicommissum* in order to avoid the strictness of the Mortmain Statutes.<sup>96</sup> Evidence of such transplantation has been suggested via reference to a well known letter written by Saint Jerome in 393 A.D. in which an equivalent situation is described with regard to ecclesiastical inheritance, and which was quoted widely in Gratian's *Concordantia discordantium Canonum* (c.1150).<sup>97</sup> As Avini comments: «It has been suggested that this letter was well-known in the Middle Ages and that the use of the *fideicommissa* in the clerical context inspired the ecclesiasts of the fourteenth century»; adding: «Moreover, the Roman theory postulates that because the ecclesiasts were the originators of the use in England, it could only be logical that they would look to the corpus of Roman law, the legal system that served as the basis for the canon law of the Church.»<sup>98</sup> Yet, this theory is susceptible to criticism. The main similarity between the trust and the *fideicommissum* is that they both share a proprietary character. However, the main difference between the Roman device and the English use is that the latter in its inception was hardly ever the effect of a will, while the *fideicommissum* was utilized mainly in testamentary transactions.<sup>99</sup> Avini adds another point of critique by noting that it was the legatee (*fideicommissarius*) of the *fideicommissum* that was held to be the actual owner, rather than the *haeres fiduciarius*: «the legacy was said to have been «restored» to him [the *fideicommissarius*, *author's addition*]». <sup>100</sup> This was, in any case, the classic theory of origin until Maitland.

It is worth quoting Maitland's account at length on the Roman inheritance to note the insular objection to this classic theory:

It is very possible that the case of the Franciscans did much towards introducing among us both the word *usus* and the desire to discover some expedient which would give the practical benefits of ownership to those who could yet say that they owned nothing. In every large town in England there were Minorites who knew all about the stormy controversy, who had heard how some of their foreign brethren had gone to the stake rather than suffer that the testament of St. Francis should be overlaid by the evasive

<sup>96</sup> WILLIAM BLACKSTONE, *Commentaries*, Chicago, University of Chicago Press, 1765/1979, 2, p. 328.

<sup>97</sup> See VASSEY, *op.cit.* 93. See also AVISHEH AVINI, *The Origins of the Modern English Trust Revisited*, «Tulane Law Review», 70 (1995-96), pp. 1139-1163, p. 1148.

<sup>98</sup> *Ibid.*, p. 1148.

<sup>99</sup> See GEORGE G. BOGERT, *Handbook of the Law of Trusts*, St.Paul, Minn., 1942, p. 7.

<sup>100</sup> AVINI, *op.cit.* n.93, p. 1149.

glosses of lawyerly popes, and who were always being twitted with their impossible theories by their Dominican rivals. On the continent the battle was fought with weapons drawn from the armoury of the legist. Among these were *usus* and *usufructus*. It seems to have been thought at one time that the case could be met by allowing the *friars* a *usus* or *usufructus*, these terms being employed in a sense that would not be too remote from that which they had borne in the old Roman texts.

The reference to usufruct is interesting given that the analogy between the trust and the usufruct was indeed made in the early literature in order to explain the separation between dominium and beneficial enjoyment. The difference with the *fideicommissum* comparison is that in the case of usufruct the relationship is still proprietary in character but can be created both *inter vivos* and by will. Maitland continues:

Thus it is possible that there was a momentary contact between Roman law—medieval, not classical, Roman law—and the development of the English *use*. Englishmen became familiar with an employment of the word *usus* which would make it stand for something that just is not, though it looks exceedingly like, *dominium*. But we hardly need say that the *use* of our English law is not derived from the Roman «personal servitude»; the two have no feature in common.

At this point Maitland misses the particular transformation of *usus* by the Franciscans and its potential influence, as well as the momentary contact with Roman and canon law, adding:

Nor can we believe that the Roman *fidei commissum* has anything to do with the evolution of the English *use*. In the first place, the English *use* in its earliest stage is seldom, if ever, the outcome of a last will, while the *fidei commissum* belongs essentially to the law of testaments.

We have touched on this above, but what Maitland says immediately after, is a rather weak onomastic argument: «In the second place, if the English *use* were a *fidei commissum* it would be called so, and we should not see it gradually emerging out of such phrases as *ad opus* and *ad usum*.» Maitland towards the end of his elaboration seems to be closer to our own analysis with regard to an amalgamatic approach:

What we see is a vague idea, which developing in one direction becomes what we now know as agency, and developing in another direction becomes that *use* which the common law will not, but equity will, protect. It is only in the much later developments and refinements of modern family settlements that the English system of *uses* becomes capable of suggesting *Fidei commiss* to modern German inquirers as an approximate equivalent. Where Roman law has been «received» the *fidei commissum* plays a part which is insignificant when compared with that played by the trust in our English system. Of course, again, our «equitable ownership,» when it has reached its full stature, has enough in common with the praetorian *bonorum possessio* to make a comparison between the two instructive; but an attempt to derive the one from the other would be too wild for discussion.<sup>101</sup>

Maitland's own elaboration remains to a significant extent speculative and «wild» itself, but the suggestion that the early notion of the use was a vague idea should be coupled with the view that perhaps different influences and factors affected the invention of the English use in its formative transition from a customary practice to a juridical device. The eventual downplaying of the Franciscan influence or at least wider clerical influence by Maitland is probably misplaced. In any case, we know that during the early medieval period the condemnations of property held for the monks, as well as for the laity and virtuous poverty was very much seen as the directly opposite term to *proprietas*.<sup>102</sup>

Later writers (including, for a while, Maitland himself) argued that the origin of uses was to be found in the German *Salmannus* (possibly derived from *Sala* meaning to transfer) that was imported in the eleventh century during the time of the Norman Conquest. The institution of the *Salmannus* originated in the fifth century under the *Lex Salica*, which provided that a person (*Salmannus*) would aid completion of the transfer of property by acting as a third party.<sup>103</sup> Frequently this was devised in order to entrust *inter vivos* the transfer to beneficiary persons upon the original grantor's death (though it is uncertain as to whether such an entrusted

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<sup>101</sup> See FREDERIC W. MAITLAND, *The Origin of Uses 1*, in H.A.L. Fisher, ed., *The Collected Papers of Frederick William Maitland*, 3 vols, v.2, p. 1911. On the comparison with usufruct see MICHAEL R. T. MACNAIR, *The conceptual basis of trusts in the later seventeenth and early eighteenth centuries*, in Helmholz & Zimmermann, *op.cit.*n.95, p. 207. Macnair refers to the work of Sir Jeffrey Gilbert.

<sup>102</sup> See SEIPP, *op.cit.*n.13.

<sup>103</sup> See MAITLAND, *op.cit.*n.33, p. 127. Maitland, in fact, attempted to fuse the Roman origin theory with the Germanic one but eventually opted for the latter explanation. See also OLIVER W. HOLMES, *Law in Science and Science in Law*, «Harvard Law Review», 12 (1899), p. 443.

delivery was actually a matter of obligation and it remained a fiduciary relationship unrecognized by positive law). Justice Oliver Wendell Holmes (whom Maitland would later follow) was the first proponent of this theory, which enjoys considerable adherence today, conceiving of the English use as essentially a fiduciary relationship which was not enforced by law, and comparing the *Salmannus* (or *Salman*, or *Treuhand*)<sup>104</sup> to the feoffee to uses.<sup>105</sup> Holmes thought that the earlier scholars were wrong to advance the theory as to the Roman origin of uses. Holmes speculated that the English use originated in the eleventh century when during the Norman Conquest elements of teutonic Salic law were arguably imported by the Conqueror.<sup>106</sup> Brown has suggested that the theory could also rely on the migrations of Germanic tribes to England more generally during the fifth century. Brown notes:

The most important resemblances between the *Salman* and the English feoffee to uses were that both were most frequently used for the transfer of land after the death of a grantor. In each instance the grantor was entitled to the use of the land until he died. In each case there was the element of confidence.<sup>107</sup>

In terms of actual evidence of the use of the *Salmannus* is provided by Holmes and noted more recently by Avini who writes: «Evidence of the use of the *Salmannus* in *post mortem* transfers of land in twelfth-century England provides the basis for the proposition that the *Salmannus* developed into the feoffee to uses.»<sup>108</sup> Smith, further, notes one of the key arguments for the similarity of the English practice and the Germanic one:

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<sup>104</sup> RICHARD HELMHOLZ & REINHARD ZIMMERMANN, *Views of trust and Treuhand: An introduction*, in Helmholtz & Zimmermann, *op.cit.* 95, p. 39.

<sup>105</sup> See OLIVER W. HOLMES, *Early English Equity, 2 Select Essays in Anglo-American Legal History*, in Association of American Law Schools, ed., *Select Essays in Anglo-American Legal History*, 1908/1885, p. 705. See the analysis by BRENDAN F. BROWN, *The Ecclesiastical Origin of the Use*, «Notre Dame Lawyer», 10 (1934-5), pp. 353-366. See also HOLMES, *op.cit.*n.103, pp. 445-6. The widespread availability of German legal treatises in the United States during the nineteenth century presents itself as the main explanation for Holmes' turn to the *Salman*.

<sup>106</sup> Maitland & Pollock write in relation to the Germanic example and its similarity to the English custom: «in the England of the twelfth century we sometimes see the lord intervening between the vendor and the purchaser of land. The vendor surrenders the land to the lord «to the use» of the purchaser by a rod, and the lord by the same rod delivers the land to the purchaser.<sup>183</sup> Freeholders, it is true, have soon acquired so large a liberty of alienation that we seldom read of their taking part in such surrenders; but their humbler neighbours (for instance, the king's sokemen) are often surrendering land «to the use» of one who has bought it. What if the lord when the symbolic stick was in his hand refused to part with it? Perhaps the law had never been compelled to consider so rare an event; and in these cases the land ought to be in the lord's seisin for but a moment»; See POLLOCK & MAITLAND, *op.cit.*n.12.

<sup>107</sup> *Op.cit.*n.72, p. 358.

<sup>108</sup> *Op.cit.*n.97, p. 1150.

[...] rests primarily upon the practice under Salic law according to which the *Salmannus* was handed a symbolic staff by the donor, which he, in due course, and with due solemnity, handed to the donee. A virtually identical ritual took place in England until modern times with respect to the transfer of copyhold, whereby a staff was handed to the steward of the manor as a first step in conveying copyhold land to another, the surrender to the steward being an expression to the use of the donee or purchaser.<sup>109</sup>

It is not difficult, however, to criticize the Germanic theory for relying on rather superficial comparative attempts to bring the *Salmannus* closer to a theoretical resemblance of the feoffee to uses, since just as with to the *fidecommissa* it is often overlooked that the *Salmannus* acted merely as a testamentary executor and not as a trustee. Most crucially the theory is open to criticism on the basis of the lack of related evidence since despite of Holmes' attempt it appears rather impossible to prove the link between the trust and *Treuhand* (the origin itself of *Treuhand* is not yet fully determined). Avini emphasizes that there is hardly any factual evidence that the *Salmannus* was used in English transactions, as Holmes maintained, or indeed that the Normans had utilised it. The question as to the link between the two concepts remains open but as yet it cannot be answered confidently. Avini adds:

[...] Henry de Bracton, the thirteenth-century English legal historian and Justice of the King's Bench during the reign of Henry III, made no mention of the *Salmannus*, although he did mention two other conveyance devices that served purposes similar to those of the *Salmannus*.<sup>110</sup>

What can be stated with some confidence, instead, is that in *ius commune* Germanic and Romano-canonical sources did mix and perhaps it can said that in the continent the link between the *Treuhand* and the Romano-canonical sources could be potentially established, while in the Anglo-American context the purported link appears to have mistaken similar social situations for a conceptual analogy.

Maitland was of the view that there was enough affinity between the English use and the Roman origin theory to make it credible, in that the Latin phrase *ad opus* had first appeared in the ninth century in England, is present in the Anglo-Saxon books of that time; and becomes

<sup>109</sup> DAVID T. SMITH, *The Statute of Uses: A Look at its Historical Evolution and Demise*, «Western Reserve Law Review», 18 (1966-7), pp. 40-63: 40.

<sup>110</sup> See AVINI, *op.cit.*n.97, p. 1151; see also, BARTON, *op.cit.*n. 35, p. 562. See on *ius commune*, REMCO VAN RHEE, *Trusts, Trusts-like Concepts and Ius Commune*, «European Review of Private Law», 3 (2000), pp. 453-462.



widespread during the early thirteenth century.<sup>111</sup> Maitland points to evidence of conveyances to bishops to the use of churches and monasteries from the first quarter of the ninth century onwards, as well as applications of the same manner of holding in private arrangements during the first quarter of the thirteenth century. For Maitland the use in its early development was an indeterminate interest which in each occasion functioned in favour of the beneficiary in question. Maitland later argued in fact for a mixed Romano-Germanic theory of origin.<sup>112</sup> Maitland argued in addition that there was a relatively safe presumption underlying this link since the use appeared in Germanic sources in the records of the early Franks and Lombards, which was then Gallicized to «*al os*» and «*ues*» and as such made its entry into the *Domesday Book* and the Laws of William the Conqueror. From the Germanic sources the phrase was transformed into the Anglo-Saxon books of the ninth-century and evolved into the English term of use. Maitland writes in glorious English:

First as to words. The term «use» is a curious one; it has, if I may say so, mistaken its own origin. You may think that it is the Latin *usus*, but that is not so; it is the Latin *opus*. From remote times –in the seventh and eighth centuries in barbarous or vulgar Latin you find «*ad opus*» for «on his behalf». It is so in Lombard and Frank legal documents. In Old French...this becomes *al oes*, *ues*. In English mouths this becomes confused with «use».<sup>113</sup>

Curious indeed. For Maitland the question as to whether the *cestui que use*, which was the transformation of the «*ues*» into «use» via the evolvement of the French «*cestui a qui oes le feffement fut fait*» into «*cestui que use*», have the mere enjoyment of a property or a beneficial ownership is the key question that arose due to the arrival of the Franciscan friars during the thirteenth century and who argued, Maitland reports, that an *ad opus* was equivalent to the

<sup>111</sup> POLLOCK & MAITLAND, *op.cit.*n.12, p. 231. On Maitland's views as to the influence and binding effect of Roman canon law in the English jurisdiction, see CHARLES DONAHUE, JR., *Roman Canon Law In The Medieval English Church: Stubbs vs. Maitland Re-examined After 75 Years In The Light Of Some Records From The Church Courts*, «Michigan Law Review», 72 (1973-74), pp. 647-716.

<sup>112</sup> *Ibid.* The *Domesday Book*, a survey from 1086 notes lands held *ad usum* or *ad opus regis* or *ad opus reginae* or *ad opus vicecomitis*. See *Domesday Book: A Complete Translation*, A. Williams & G.H. Martin, eds., trans., London, 2003, (D.B., I, 60B, 209). See also the discussion in BROWN, *op.cit.*n.72, p. 359; and the description of various types of custodian arrangements in JOSEPH BIANCALANA, *Thirteenth Century Custodia*, «Journal of Legal History», 22 (2001), pp. 14-6. The expression *al os le rei* (for the use of the King) was also noted in the laws of William I as to the manner in which the sheriff would hold money (*Legis Wilhelmus*, I.2, para.3 and D.B. i.60b and 209).

<sup>113</sup> FREDERIC MAITLAND, *Equity Also the Forms of Action at Common Law: Two Courses of Lectures*, Cambridge, 1909, p. 24.

Roman *usus* (and not the *fiddei commissum*).<sup>114</sup> For Maitland this is why the phrase of *ad opus* was widespread and also why it was later simply replaced eventually by the word *use*. In addition to the Germanic sources, Maitland advanced the point that the Franciscan influence and utilization of the *ad opus* form was the equivalent of the Roman *usus* and not of the *fideicommissum*. Avini suggests that it is thus possible to understand Maitland as arguing thus that «the identification of the «*ad opus*» with the Roman «*usus*» resulted in the currency of the word «*use*» instead of «*ad opus*», which was eventually abandoned.»<sup>115</sup> Once more the main criticism here, as with the earlier theories, is that most of this version of the origin of the English *use* remains widely speculative. In addition, it is worth noting that later modern writers, largely influenced by Maitland, too rigidly distinguish the terms *ad opus* and *usum*. It seems that the variation of the views of different writers as to this distinction is largely based on a reading of *usum* in the Roman legal sense, rather than on the more factual and eventually Franciscan sense, wherein «for the use of», or «for the benefit of», can be seen as conceptually at least synonymous.

Thomas reported in 1949 that, at a conference on Islamic Law publicised in 1937, a third theory was proposed which suggested, in contrast, that the device of the *use* and the early form of the trust originated in the borrowing of a device of Islamic law (*waqfs*), which the crusaders or the friars could possibly have observed and transplanted in the English legal system, at least indirectly.<sup>116</sup> The Islamic *waqf* (or *habs*), as Avini explains:

[...] is created upon the declaration of the owner (the *waqif*) that the income of the subject property is to be permanently reserved for a specific purpose, at which point his ownership is «arrested» or «detained».<sup>117</sup>

The key conditions that are required for an unincorporated *waqf*, which is strictly used for charitable purposes, are of interest for our comparative perspective with regard to *uses* since they entailed that: (1) that the endowment is in perpetuity; (2) the *waqf* must be immediately effective, unless it arises by testament in which case it can be postponed; (3) the dedication of property must be irrevocable; and (4) the property in question must be of a permanent nature

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<sup>114</sup> POLLOCK & MAITLAND, *op.cit.*n.12, p. 235.

<sup>115</sup> *Op.cit.*n.97, p. 1152.

<sup>116</sup> ANN VAN WYNEN THOMAS, *Note on the Origin of Uses and Trusts – WAQFS*, «Southwestern Law Journal», v.3, pp. 162-166. Francis himself has visited Islamic territories between 1219 and 1220. See also, GILBER PAUL VERBIT, *The Origins of the Trust*, Xlibris Corporation, 2002, p. 111.

<sup>117</sup> AVINI, *op.cit.*n.97, p. 1153.

and yield usufruct.<sup>118</sup> Nonetheless, as Avini notes, the *waqf* entertained secular uses as well, which included: «[E]vasion of taxation, control over excesses of heirs, accession of power over the masses by paying their religious leaders, and most prominently, immunity from government confiscation.»<sup>119</sup> The *waqf* was known by two types, which nonetheless maintain a modern typology: one type entailed an endowment for an object of a religious nature (*waqf khairi*) and another which entailed a family endowment (*waqf ahli* or *dhurri*).<sup>120</sup>

As to the origin of the *waqf* it remains speculative in itself, but two possibilities are of particular interest. One theory suggests that the Prophet Mohammad «wished to buy certain gardens to build a mosque, but owner would not take money. Instead he gave the land «for the sake of God».»<sup>121</sup> The overall aim or condition, hence, of the *waqf* was that it pleases God (*qurba*). Another theory has suggested that the *waqf* was adopted from the Byzantine device of the *Piae Causae*. The *Piae Causae* were charitable endowments created by gifts mediated by the *administratores* under the supervision of a bishop.<sup>122</sup> The plausibility of this theory, according to Avini and other scholars, is partly based on the assumption that the idea of the *waqf*, which was the peak of its development during the Crusades, was transplanted in England by Franciscan Friars upon their return from the Crusades during the thirteenth century.<sup>123</sup> The two systems of Islamic and English law, in addition, could be seen as comparable and to a some extent compatible: «Both legal systems were indigenous, national laws; both were based on custom; unlike civil (Roman) law and canon law, they were not codified laws; each in its own peculiar way was a judge-made law, following a case-law method, and the courts of each were characterized by a jury system of sworn witnesses, familiars with the facts of the case.»<sup>124</sup> Avini couples this theory with that of Maitland as to the Franciscan utilization (or even introduction) of the use in England, given the activity of the Friars in the Middle East and Francis' own

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<sup>118</sup> Summarising here AVINI, *op.cit.*n.97, pp. 1153-4.

<sup>119</sup> *Ibid.*, pp. 1154-5.

<sup>120</sup> See MONICA M. GAUDIOSI, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England*, «University of Pennsylvania Law Review», 136 (1987-88), pp. 1231-1261: 1233.

<sup>121</sup> AVINI, *op.cit.*n.97, p. 1155.

<sup>122</sup> See NOEL J. COULSON, *A History of Islamic Law*, Edinburgh, Edinburgh University Press, 1964, p. 28. Contrast with WILLIAM R. JONES, *Pious Endowments in Medieval Christianity and Islam*, «Diogenes» 109 (1980), pp.23-36. See the discussion in AVINI, *op.cit.*n.97, pp. 1155-6.

<sup>123</sup> See HENRY CATTAN, *The Law of Waqf*, in Majid Khadduri & Herbert H. Liebesny, eds., *Law in the Middle East*, Washington D.C., The Middle East Institute, 1955: 213-218. See also THOMAS, *op.cit.*n. 116. See further the careful analysis and application of this theory on the 1264 Statutes of Merton College in Oxford by GAUDIOSI, *op.cit.*n.120.

<sup>124</sup> See GAUDIOSI, *op.cit.*n.120, p. 1256.

expeditions between 1219 and 1220.<sup>125</sup> Adding: «Certainly, the introduction of such a legal device would be welcome in a country like England where, according to Bacon, the lands were neither testamentary nor devisable.»<sup>126</sup>

The theory is indeed plausible enough historically and culturally and the similarities between the *ad opus franciscanorum* and the *waqf* are not to be easily dismissed. Both the *ad opus* use and the *waqf* as extra-legal devices aimed at avoiding proscriptions and other financial burdens, both separated ownership and use (or usufruct), both entailed a beneficiary as well as the possibility of succession and finally both share a fairly common structure: the *waquif*-feoffor parallels the *mutawalli*-feoffee.<sup>127</sup> The plausibility of this theory stumbles, however, perhaps, contrary to Avini's view, on the fact that the Franciscans in England were widely knowledgeable of the continental dispute over poverty and active within it, as well as eventually aware of the inventive argument as to the *simplex usus facti*. If the *simplex usus facti* was the end, it is plausible that the *waqf*, if so transplanted, could have provided a means or at least a partial inspiration (among others) for its adaptation in England. After all, the English use in its early formation and the *waqf* could have provided a fertile ground for an amalgam to be formed that served well the Franciscan purposes. It is, however, important to underline the fact that the beneficiary of the *waqf* had a legal interest in the usufruct of the *waqf* property and as such the Franciscans would, in order to utilise it, have needed to transform it first into a form which did not entail a legal interest, since the latter would conflict with their vow.

Ames one of the most distinguished American legal historians of his time is, in further contrast, also the historian most identified with early pronouncements that the origin of the use in England was a merely indigenous formation. One of the problems with this view is that it insists on focusing only on the institutional, and particularly the judicial history of the use in England. For Ames the use is a legal concept and as such it bears no relation to extra-legal employments of the past. Hence Ames places the starting point at the first quarter of the fifteenth century when the English Chancellor allegedly began to enforce the rights of the *cestui que use*.<sup>128</sup> Yet as Brown

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<sup>125</sup> AVINI, *op.cit.*n.97, p. 1159 and CATTAN, *op.cit.*n.123, p. 214.

<sup>126</sup> *Op.cit.*n.97, p. 1160.

<sup>127</sup> See AVINI, *op.cit.*n.97, pp. 1160-1. It would be further interesting to examine the connections that were formed between the Normans and the Muslims at the Kingdom of Sicily. See on this DONALD MATTHEW, *The Norman Kingdom of Sicily*, Cambridge, Cambridge University Press, 1992. This note is indebted to Professor Patrick McAuslan's suggestion.

<sup>128</sup> See JAMES BARR AMES, *Lectures on Legal History*, Boston, Harvard University Press, 1930, p. 237. See also the discussion in BROWN, *op.cit.*n.72, p. 360.

argues: «The English use is more properly the creation of jurisprudence [and of intermixing, *author's addition*] than of any system of positive law. From the jurisprudential point of view, the use proved to be a quite powerful equitizing medium suggested by natural law, of inestimable value to mankind during eras which were characterized by juristic stagnation and artificiality.»<sup>129</sup> What is probably safe to presume is that the ecclesiastical influence on the so-called origin of the English uses is most prevalent in all the early theories, whether in an implied or direct manner (i.e. as in Maitland and Holmes). The eventually proprietary tenure of *ad opus*, arose too, according to Brown, in the disputes on the nature of the ownership of Church property in the medieval period:

Was such property owned by the ecclesiastical custodians of the property, or by the individual Church, or by the deceased patron saint, or by God Himself? The phrase «*ad opus*» was perhaps coined to indicate that the one who had an «*ad opus*» was a living incorporeal person, owning the property in an unusual and distinctive way, but still not capable of that type of ownership which was possible by one who was in the flesh. This most probably explains why there are so many examples of the phrase to describe ownership by a Church or a deceased Saint.<sup>130</sup>

With regard to the early ecclesiastical interventions, Helmholz discovered a number of cases to support this further from 1375 to 1450 in the diocesan court records of Canterbury and Rochester.<sup>131</sup> Helmholz asked in 1979:

How can so important and so widespread an institution have existed without legal sanction? Can its effectiveness really have rested solely on the conscience and good sense of the feoffees prior to the time the Chancellor began to intervene?<sup>132</sup>

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<sup>129</sup> *Op.cit.*n.72, pp. 361-62.

<sup>130</sup> *Ibid.*, pp. 363-64: Brown notes occurrences of the phrase *ad opus* in the Frankish formulae of the Merovingian period, as in *ad opus sancti illius*; also found in the Anglo-Saxon land books, during the time of Kenulf and Beornwulf of Mercia in the ninth century, A.D., in the form of *ad opus monachorum*. This was applied to Church property and later to women and children in particular, as well as to the ownership of property by the Sovereign and by the deceased. As to officers who received money on behalf of the king, what they kept for their own use was known as *ad opus suum proprium*. Brown also notes the expression of *ad usum fratrum eternaliter* in 1080 A.D. to describe an interest in property that was given to an abbot by deed; *ibid.*: 364. In the thirteenth century the use of *ad opus* is commonly found to denote what could be described in modern terms as an informal agency.

<sup>131</sup> RICHARD H. HELMHOLZ, *The Early Enforcement of Uses*, 79 *Columbia Law Review*, 1979, pp. 1503-13: 1504 and 1513.

<sup>132</sup> *Ibid.*, p. 1503.

For Helmholz this seemed implausible since the temporal gap between the later enforcement of uses by the Chancery Court was very wide and the idea that such uses rested purely on the personal character of an «obligation» appeared unrealistic. While it was thought earlier that the Church's tribunals would not interfere with regard to freehold land and any evidence of their intervention with regard to uses has been scarce.<sup>133</sup> Helmholz has at least provided some evidence to support the earlier speculation by Maitland and Milsom.<sup>134</sup> The evidence is localised to the dioceses of Canterbury and Rochester but can potentially be indicative of a wider enforcement. Helmholz, thus, argues that from the last quarter of the fourteenth century as far as surviving records can show, cases involving uses did appear before the diocesan courts suggesting that «the *cestui que use* who held such an interest evidently had a right in the Church courts to enforce it against the feoffees.»<sup>135</sup> Interestingly the cases that Helmholz examined involved not only clerics but laymen as well, further complicating the history of the involvement of the ecclesiastical courts, since the reasons behind their intervention were not obvious. Helmholz notes that all the cases he read in the records (though many have not survived) involved dead feoffors and that, given the probate jurisdiction of the Church, such cases fell possibly within its legitimacy.<sup>136</sup> Another crucial reason behind the undertaking by the Church courts could be that:

A principle of canon law held that the courts of the Church should provide justice whenever secular law was inadequate. [...] A living feoffor normally had a remedy at common law: he could enter for breach of the condition. The *cestui que use*, however, could not, and since after the death of the original feoffor he alone would have any incentive to complain, there was no other way in which the use could be enforced prior

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<sup>133</sup> See MARGARET E. AVERY, *An evaluation of the effectiveness of the Court of Chancery under the Lancastrian Kings*, «Law Quarterly Review», 84 (1970), pp. 84-97; and *Id.*, *History of the Equitable Jurisdiction before 1460*, «Bulletin of The Institute of Historical Research», 42 (1969), pp. 129-144. For criticism of Avery's work see NICHOLAS PRONAY, *The Chancellor, the Chancery and the Council at the End of the Fifteenth Century*, in H. Hearder & H. Loyn, eds., *British Government and Administration: Studies Presented to S.B. Chrimes*, Cardiff, University of Wales Press, 1974, pp. 87-103. See also JOHN M.W. BEAN, *The Decline of English Feudalism, 1215-1540*, Manchester: Manchester University Press, 1968.

<sup>134</sup> See STROUD F. C. MILSOM, *Historical Foundations of the Common Law*, London: Butterworths, 1969, p. 171.

<sup>135</sup> *Op.cit.*n.131, p. 1505.

<sup>136</sup> See MICHAEL M. SHEEHAN, *CSB, The Will in Medieval England*, Pontifical Institute for Mediaeval Studies, Studies and Texts, ser.6, Toronto, 1963.

to the rise of the Chancellor's jurisdiction. [...] Without this remedy, a decedent's final wishes would have been legally unenforceable.<sup>137</sup>

The eventual deferral of ecclesiastical jurisdiction on testamentary matters to the Court of Chancery can be explained on the basis that, first, canon law «did not consider testamentary jurisdiction to be exclusively spiritual in nature» and, second, that «by the time the Church had lost its jurisdiction over feoffees, the Chancery regularly offered the *cestui que use* a remedy against a feoffee.»<sup>138</sup> Much remains, however, yet to be discovered as to the influence of the canonical and Franciscan conceptions of *usus* through the further investigation of the records of the ecclesiastical courts in England.

## 5. THE CASE OF OXFORD v FRIARS MINOR [1308]

In an attempt to speculate further on the legal arrangements that the Friars actually entered into in England, and in Oxford in particular, we can briefly turn to examine at this point the reported case of *Oxford v Friars Minor (Guardian Of)* from 1308, eighty years or so after the friars occupied their early premises as Thomas of Eccleston narrates.<sup>139</sup> The widow of a Christopher brought an action to recover at common law one third of the property that her husband owned, under her dower entitlement, according to that which he possessed during his life time. Her husband had held the freehold title to the respective third during their marriage and it was while they were still married that he sold the land and tenements to Edmund, Earl of Cornwall. Edmund had then granted to the friars possession (not the freehold) of the land in question «*ad usum plenarium et aisiamentum*».<sup>140</sup> The grant here deviates from the customary practice of the time to involve the municipality on the behalf of the friars, or perhaps offers us a glimpse of the variety of arrangements that were available at the time. This is how the legal question is

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<sup>137</sup> HELMHOLZ, *op.cit.*131, pp. 1507-8.

<sup>138</sup> *Ibid.*, p. 1512.

<sup>139</sup> (*Year Book* 2, Edward II, n.143), in F. W. Maitland, ed., 19 Selden Society 75, 1904. For examples of property grants to the Franciscans and their life in Oxford, see ANDREA G. LITTLE, *The Grey Friars in Oxford*, Oxford, Oxford Historical Society, Clarendon Press, 1892).

<sup>140</sup> *Ibid.*, pp. 75-6; see the summary and discussion in DeVINE, *op.cit.*n.34, pp. 4-5.

described in the report of the case as contained in the *Year Books* of Edward II under the title *Donatio facta Fratribus Minoribus*:

Question is raised touching the nature of the rights given to the Franciscans by a deed which purports to vest in them the use of certain houses. Alice, sometime wife of Cristopher, son of Simon of Oxford, by her attorney demands against the Guardian of the Order of the Friars Minor of Oxford the third part of two messuages and of three cottages with the appurtenances in Oxford as her dower etc. And the Guardian by his attorney comes and says that he has not fee nor freehold in the said messuages and cottages, but only use [*usum*] and easement [*aisiamentum*] by the grant of Edmund late Earl of Cornwall [...].<sup>141</sup>

The grant by the Earl of Cornwall to the friars is detailed more specifically in what follows:

That we Edmund Earl of Cornwall have given and granted and by this writing confirmed for us and our heirs to the Friars Minor of Oxford, with pious intent and for our soul and the soul of the King our father, whose heart is buried in the choir of the said Friars, the full use [*usum plenarium*] and easement [*aisiamentum*] of the houses and sites which we bought from Christopher, son of Simon of Oxford, which houses are situate near the schools of the said Friars, in the parish of St. Ebb at Oxford, as is more clearly contained in the charter of the said Christopher, and also the use [*usum*] and easement [*aisiamentum*] of all buildings which may happen to be built by us in the said place, and of all other commodities which are reputed to belong to the said houses and sites by any title whatsoever, so that after our death the said Friars may freely dispose of all the said buildings by removing them or otherwise in such wise as may seem to them expedient for their use and easement. And therefore (the Guardian) says that he has and claims nothing [*nichil habet vel habere*] in the said tenements save at the will of the King [*ad*

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<sup>141</sup> *Ibid.*, pp. 75-6. In the original it reads: «*Alicia quae fuit uxor Ghristofori filii Simonis de Oxonia per attornatum suum petit versus Gardianum Ordinis Fratrum Minorum de Oxonia terciam partem duorum mesuagiorum et trium cotagiorum cum pertinenciis in Oxonia ut dotem etc. Et Gardianus per attornatum suum venit et dicit quod ipse non habet feodum nee liberum tenementum in predictis mesuagiis et cotagiis nisi tantam usum et aisiamentum ex conceesione Edmundi naper Comititis Cornubie [...]*».



*voluntatem domini Regis*], cousin and heir of the said Edmund etc. And he demands judgment of the writ etc.<sup>142</sup>

It is important to note from the start that the term *usum* or use, as we have seen, could be understood in a literal or customary sense, as well as in a more legal sense and the same holds for *aisiamentum*, which in a literal sense signified a privilege, a convenience or a mere benefit. In fact in 1308 the later technical understanding of *aisiamentum* as an easement in a legal sense had not yet become part of English law. When DeVine turns to examine the terms of the grant in question, he asks in what sense the terms *usum* and *aisiamentum* are to be understood, noting that they could refer to a mere factual description of the Earl's generosity «rather than its legal nature.»<sup>143</sup> This is possible, yet it is also possible that the choice of words is not accidental or merely suggestive of the Earl's generosity. DeVine notes, that if a Roman-type *usus* arrangement was being granted then the addition of *aisiamentum* would have been redundant. Strictly speaking the addition of *aisiamentum* would perhaps be redundant, however, it can also be seen as adding to the descriptive form of *usus* that is referred to «for the use and benefit» as a mere repetition for emphatic purposes. If, as the friars argued, they held no property title or rights whatsoever (and on this basis demanded judgement on the writ via their guardian). Alice, DeVine suggests, had most likely targeted the wrong parties in this action and should have petitioned the King instead. This is most likely an accurate estimation even though we do not know if judgment was granted in this case. The case's decision, if there was one, is not reported so it only remains for us to speculate as to what the possible outcome could have been on the basis of the grant's terms.

DeVine raises a number of insightful points that we summarise and comment upon in what follows. First, De Vine argues, the friars were most likely *de facto* tenants at sufferance of the

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<sup>142</sup> *Ibid.* In the original it reads: «*Noverint universi etc. quod nos Edmundus Gomes Cornubie dedimus et concessimus [et] pro nobis et heredibus nostris confirmavimusB isto scripto Fratribus Minoribus Oxonie pietatis intuitu et pro anima nostra ac anima Regis patris nostri, cuius cor in choro dictorum Fratrum traditur sepulture, usum plenarium et aisiamentum omnium domorum et arearum quas emimus de Ghristofo filio Simonis de Oxonia, que domus iuxta scholas eorundem Fratrum in parochia Sancti Ebbe Oxonie situantur sicut in carta dicti Gristofori de eisdem domibus cum suis pertinenciis nobis facta clarius continetur, et insuper usum et aisiamentum omnium edificiorum que per nos in dicto loco contigerint edificari et omnium aliarum commoditatum que ad easdem domos et areas quocunque titulo pertinere noscuntur ; ita quod prefati Fratres de omilibus edificiis antedictis libere possent post mortem nostram ordinare eas amovendo vel aliter secundum quod eorum aisiamento et usui magis viderint expe[dire] etc/ Unde dicit quod ipse nichil habet vel habere clamat in predictis tenementis nisi ad voluntatem domini Regis consanguinei et heredis predicti Edmundi etc. Et petit indicium de brevi etc.*»

<sup>143</sup> *Op.cit.*n.34, p. 4.

King, given the way their guardian described their position as lacking legal rights and being at the mercy and the will of King Edward II (the Earl of Cornwall's heir). Yet this would, strictly-speaking, run counter to the fact that no one was then held as able to be a tenant at sufferance against the King. Given that a tenancy at sufferance is not an interest in land such a form of tenancy could have been sufficient for the purposes of the Franciscans. In addition, however, such a tenancy requires an absence of the grantor's or landlord's consent and in this particular situation such a withdrawal of consent is not evident in the facts. Since this would be potentially a *de facto* tenancy at sufferance (similarly to the way in which a *cestuis que use* was perceived as such a tenant later on), a *de jure* tenancy was not formed since, neither a term is specified which the friars would have exceeded, nor are any conditions other than the will of the King described, nor was another form of legal tenancy undertaken. Under a *de facto* tenancy at sufferance the Franciscans held no estate or other interest but simply bare possession subject, now, to the will of the King.

Second, the terms describe the grant as entailing the power to dispose «all of the said buildings» as expedient for their use and benefit (*aisiamentum*). Could this be describing a right? It was not and could not be an easement, since the freehold at the time could not be transferred at will and in any case the King, as is obvious, «could not be holding for the use of a third party».<sup>144</sup> A right of disposal would be a self-evident form of ownership, which the grant does not describe as such and the Franciscans would not have been able to receive according to their vow. As such the power of disposal in the said property could be seen either as a mere factual emphasis on the liberty of use as granted, or as superfluous, in that it would not be exercised as a legal right by the Franciscans (or indeed could be seen as both). In addition, the Earl could not, as a matter of law, transfer his freehold (or presumably any legal rights) by will, since not only would the Friars not have accepted such a transfer but also, crucially, the King would not have held for the use of another. The King inherited the freehold but we know nothing of an interference with the use of the friars.

Third, DeVine notes that there was no enfeoffment and neither were there any instructions to feoffees described in the grant, because, if there had been, then «it would not have been possible to claim a tenancy at sufferance».<sup>145</sup> The terms of enfeoffment are indeed not referred to and hence the claim that this was an arrangement which could be described as an enfeoffment to uses

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<sup>144</sup> *Ibid.*, p. 5.

<sup>145</sup> *Ibid.*, p. 6.

appears inaccurate. The Earl was certainly familiar with the device of feoffment to uses (he had in fact received one) and thus the absence of any reference to such instructions suggests that his intent was simply to let the friars use the premises in St. Ebb's without conferring to them any legal title or rights, while conscientiously binding himself to the agreement (possibly under oath). It is possible too that some interaction with the friars had taken place prior to the grant (we simply do not know the background to the grant in any case) and given that more than any other social class it was the landowning class which promoted the device of feoffment to uses, the friars would certainly not have identified with such a cause as its main purpose was to facilitate, among else, land ownership as such.

Fourth, the grant seems to be granting possession and enjoyment or benefit rather than title or rights, but if that is so, then why was a grant used for this purpose? DeVine suggests that it is likely that the Earl either misunderstood what was necessary for his actual grant to the friars or was, perhaps, merely attempting to confer jurisdiction to the ecclesiastical courts in order to create a so-called morally, and not legally, binding agreement. DeVine, thus, writes:

The Church, [...], continued to intervene in cases involving freehold when the underlying issue was breach of a promise, whether sworn (*fidei laesio*) or unsworn (*nudum pactum*). Indeed, the ecclesiastical courts' jurisdiction over breached promises may have constituted the theoretical justification for those courts to take jurisdiction over at least some feoffments to uses in the period before the Chancellor began regularly to intervene to protect *cestuis* under uses.<sup>146</sup>

Fifth, DeVine argues that the Franciscans may have been aware of the Roman law concept of *usus*, but it is unlikely that in this situation they would have cared to analyse the agreement in juridical terms: «They had obtained the enjoyment of the property they needed without its ownership; that was what mattered to them in the situation.»<sup>147</sup> DeVine's point is sufficiently pragmatic but naturally this does not preclude the possibility that the Franciscans would have analysed the agreement in their own terms, most likely along the lines of their understanding of the continental notion of simple use. In addition,

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<sup>146</sup> *Ibid.*, p. 7.

<sup>147</sup> *Ibid.*, p. 6.

[T]here would, (...), have been no reason to create an *usus*, as the common law did not recognize divided and subordinated rights *in rem* relating to property as had the Roman law in the dichotomy of *dominium* and *usus*. The friars would have been in exactly the same position as if the Earl had simply allowed them to occupy and enjoy his property.<sup>148</sup>

Yet DeVine presupposes in his analysis, at least to an extent, that the *usus* style arrangement which could have been employed by the Franciscans was the one that Roman law offered, whereas in the thirteenth century the Franciscans would in fact borrow and radically reform the understanding of *usus* as such as simple, non-juridical, use. The Franciscans were certainly aware of the continental utilization of *usus* reinterpreted by at least the mid thirteenth century as simple use (a matter of fact, not right) and it is not far-fetched, perhaps, to presume that in terms of a guide or inspiration it was this discussion over medieval Roman and canon law that gradually reformulated their practice of the rule of Francis during this crucial period. It is also unlikely, DeVine points out, that the Earl would, on his own, have employed an unfamiliar Roman-canonical device to make a land transfer in this manner when he had already decided (we can deduce) not to rely upon the one which was familiar to him (enfeoffment to uses). For the sake of a working hypothesis, could the friars theoretically have been *cestuis* to use? The answer is probably negative given that *cestuis* were enjoying a right, or at least a semi-right in law that would be a direct breach of the friars' vow. The Franciscan rightless position here is further supported by the fact that they had not brought the action to court themselves, and neither were they seeking to enforce a property right or interest of any kind.<sup>149</sup> Instead the friars could only have had a *de facto* tenancy at sufferance (*non habent feodum nec liberum tenementum*) under which the freeholder and his heir retained all legal rights. Yet the terms of the grant render unclear precisely what such retained rights would entail, given that once the King inherited the land the question appears silenced.

Furthermore, while the *ad opus* use was already available during the time of this case, historians have, as we have seen, suggested that while the Franciscans were not necessarily the originators of such uses (and the evidence for this date remains inconclusive), and was already reported prior to their arrival (though again the evidence and the interpretation of the form of early uses remain an open question), the Franciscans were possibly the most prominent

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<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, p. 8.

recipients of, and perhaps the most potent influence in the actual formation of uses outside the English courts.<sup>150</sup> It has been suggested that the earlier ecclesiastical utilization of the use was already framed (even before *Quo elongati* was brought to the attention of the friars in England) by reference to the device of «spiritual friends», such as John of Malvern.<sup>151</sup> However, in our view it is problematic to assert that given the strictness of their vow, that the friars would have simply adopted an allegedly indigenous practice of uses in England without questioning its logic and premises simply because such a practice existed. DeVine, for instance, claims that the Franciscans would have had «no reason to prefer the continental over an indigenous English means of fulfilling their vows of poverty.»<sup>152</sup> Yet there were plenty of reasons why the Franciscans would have been cautious to adopt English juridical means, while the continental dispute was being fought to a significant extent on the juridical terms to which they were strongly opposed. In support of his own nuanced view, DeVine shows that: «In Canterbury, Eccleston notes that in 1225 the townspeople gave the friars the enjoyment of a chapel and a house, «*quia fraters nihil omnino appropriare sibi voluerunt, facta est communitati cititatis propria, fratribus vero pro civium libitu commodata*».»<sup>153</sup> That the medieval Chancellors would have been aware of the *Quo elongati* and the later bulls that followed, given that almost all of them were ecclesiastics and to one extent or another educated in roman and canon law, could only have added to their accommodation of the Franciscan habitation and perhaps to their interventionist stance in order to later develop the semi-legal form of the feoffment to uses and later still the stricter enforcement of the feoffors' instructions.<sup>154</sup>

Feoffment to uses, too, were most probably not the friars' invention as such, but something which they eventually adopted as it was seemingly already serving the needs of indigenous secular situations and had derived from arguably secular sources.<sup>155</sup> Yet the earlier type of use that was, as we have seen, available to the friars was at least partly derived from the ecclesiastical developments in the mid-twelfth century, which would only later become cognizable, in certain respects, by the Chancery court, and even later would become the concern of the common law. Therefore, DeVine's conclusion is mixed:

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<sup>150</sup> See BARTON, *op.cit.*n.35, p. 565. See also DeVINE, *op.cit.*n.34, pp. 8-9.

<sup>151</sup> See RODALIND B. BROOKE, *Early Franciscan Government: Elias to Bonaventure*, Cambridge, Cambridge University Press, 1959, p. 43; see also DeVINE, *op.cit.*n.34, pp. 11-12.

<sup>152</sup> DeVINE, *op.cit.*n.34, p. 9.

<sup>153</sup> *Op.cit.*n.34, p. 12.

<sup>154</sup> *Ibid.*, p. 13.

<sup>155</sup> *Ibid.*

It seems that there were at least two entirely distinct legal concepts enabling the friars to meet their minimal material needs in a manner consistent with their Rule. The first was borrowed from primarily secular sources; it was indigenous, and as Baildon and Barton note, merely «adopted» by the friars. The second, [...] was more purely ecclesiastical in origin, more universal in scope, and more Franciscan in purpose and character. The retrospective search for a chain of institutional antecedents to the feoffment to uses may have blinded legal historians to its existence, or allowed it to seem subsumed in later manifestations of the use, from which it appears to be absent.<sup>156</sup>

As we have already seen the canonical and ecclesiastic adaptation to the Franciscan anti-materialism through for example the *Quo elongati*, had provided the device of «spiritual friends» who could hold property for the Franciscans use and which was earlier already utilized in England according to Thomas of Eccleston's account.<sup>157</sup> When the Franciscans would later adapt to the position of *cestuis* under feoffments to uses, it was only under their particular understanding of «use» that they would be able to conceive their rightless status in this legal manner. As a result, irrespective of whether conclusive evidence as to the Franciscan influence on the progenitor of the trust and the particular type of use are available during this time, what is certain is that the study of their intellectual and spiritual sources, inspirations and practices form the landscape that the multi-sourced mentality that the medieval Chancellors of England were inhabiting themselves. Given that it is the early Chancellors who would determine definitively the evolution of the feoffment to uses (and later of the trust), the accommodations and disputations of the institutional Church, via canon law and medieval Roman law, cannot be sidelined by legal historians. Hence, we agree with DeVine's assessment in general terms, though not necessarily with his conclusion that: «The feoffment to uses, [...] borrowed nothing from the Romano-canonical *dominium-usus* dichotomy of ownership evident in the papal formulations of the thirteenth century.»<sup>158</sup>

The actual fervent dichotomy was that between the Papal understanding of use as a matter of right or licence, and the Franciscan anti-juridical notion of simple use, both of which were

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<sup>156</sup> *Ibid.*, p. 9.

<sup>157</sup> See *Ibid.*, p. 12.

<sup>158</sup> *Op.cit.*n.34, p. 14.

already distant to the ancient Roman law understanding of *usus*. The evidence is lacking for either position, but what is quite clear is that the English legal topography was subject to polyvalent, direct and indirect, currents, rather than merely secular or indigenous ones. DeVine's conclusion is further elaborated: «The Franciscans», he writes, «may have provided the occasion for the introduction of Roman civil law terminology and concepts into the field later occupied by the feoffment to uses, but that those Roman law concepts had no direct influence on the development of the English use.»<sup>159</sup>

The Earl could be said to have attempted to satisfy the exceptional needs of the friars by binding himself through his will as declared before the higher authority of the King. In doing so, as Parisoli has suggested, perhaps this exceptional case is evidence of the complex interweaving that was already developing between natural law and canon law principles and English positive law, which would gradually emphatically characterise the interventions of the Chancellors in the sixteenth century and the development of the trust.<sup>160</sup> While the animosity of the common lawyers, earlier and today, towards the civilian, canonical and Franciscan migrations into the system has been evident and widespread, it is, for instance, worth remembering that the ecclesiastical doctrine sculled from the municipal or pontifical laws of Rome, were if not engrafted, then adapted in one way or another within the common law system. The early doctrine of different employments of the uses is one such ingenious moment in the history of the common law, which through the interweaving of canonistic and early secular practices, along with the eventual chancery and common law courts' remixing of the early amalgam of ingredients led, arguably, to new methods of conveyancing and new species of rights that revolutionized the law of real property in England and beyond.

## 6. A NOTE

It remains a significant matter for our historical and theoretical concerns with the Franciscan ethos and their contact with divergent legal systems, that they, after a point, formulated the

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<sup>159</sup> *Ibid.*, p. 15.

<sup>160</sup> LUCA PARISOLI, *La Règle, la Pauvreté, le Destin industriel. Aux sources théologiques du capitalisme, «Franciscana»*, 23 (2008), pp. 39-147: 117.

renunciation of rights in property (and the dejuridification of the relation to things used by them) in juridical or semi-juridical terms. Hugh of Digne, for instance, wrote emblematically that the Friars «have the sole right to have no right» (*Hoc ius: nullum in his quae transeunt ius habere*).<sup>161</sup> In the *righting* of non-juridical-having the friars attempted, arguably, to locate a place void of law within the law, a relation to things that was merely factual in that it would be not illegal, but non-legal, and therefore permissible. To this logic we could perhaps find a wider plane for the reconsideration of the history of the evocations and developments of natural law principles and equity and trusts law in England in their particular.

The law can only rule on what it can capture and control and the nexus of ownership rights and property was the mechanism that at the very foundation of western legal systems facilitated the *juridification* of the use and possession of things. The fact that the new rights of beneficiary ownership and the trust would eventually be employed to protect weaker and earlier excluded parties in certain situations (including the work of charities as to the alleviation of poverty), as well as in order to assist, directly or indirectly, the wild capitalist development of our times, is perhaps an extension of the inadvertent consequences of an early medieval dispute over the rightless use of things (that evolved in numerous forms), at least to an extent. The particular manner, nonetheless, of the Franciscan dejuridification would be misunderstood if considered in juridical terms. Yet the dejuridification that the Franciscans attempted was eventually rejuridified by legal systems that prove to be capable of adapting to such claims, through transforming them into new categories of rights, absorbing non-legal uses as permissible or equitable formal delimitations in an ever enlarged regime of capture. The study, however, of the planes of the legal and non-legal uses remains an open field and it necessarily requires an intra-disciplinary approach.

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<sup>161</sup> See HUGH OF DIGNE, *Expositio Hugonis super regulam fratrum minorum*, in ALLESSANDRA SISTO, *Figure del primo francescanesimo in Provenza. Ugo e Douceline di Digne*, Firenze, Olschki, 1971. For a recent fascinating account see GIORGIO AGAMBEN, *De la très haute pauvreté: Règles et forme de vie, Homo Sacer IV.1*, J. Gayraud, trans., Paris, Payot & Rivages, 2011, p.153. See further, HUGH OF DIGNE, *De finibus paupertatis auctore Hugone de Digna*, C. Florovski, ed., «Archivium Franciscanum Historicum», 5 (1912), pp. 277-290.



Agamben, Giorgio

Ames, James Barr

Audley, Thomas

Avery, Margaret, E.

Avini, Avisheh

Baker, John, H.

Barton, John, L.

Bean, John, M.W.

Biancalana, Joseph

Blackstone, William

Bogert, George, G.

Bordwell, Percy

Brooke, Rosalind, B.

Brown, Brendan, F.

Brown, Desmond, H.

Burton, Janet, E.

Cattan, Henry

Chatton, Walter

Coing, Helmut

Coke, Edward

Coleman, Janet

Conington, Richard

Coulson, Noel, J.

De Waal, Marius, J.

DeVine, Stephen, W.

Dipple, Geoffrey, L.

Donahue, Charles, Jr.

Eckert, Jörn

Erickson, Carolly

Fitzherbert, J.

FitzRalph, Richard

Fratcher, William, F.

Gaudiosi, Monica, M.

Gilbert, Jeffrey

Gwynn, Aubrey

Haskett, Timothy, S.

Helmholz, Richard, H.

Holdsworth, William

Holmes, Oliver, W.

Hugh of Digne

Ives, Eric, W.

John, of Malvern

Johnson, Matthew, G.

Johnston, David

Jones, Neil, G.

Jones, William R.

Kingsford, Charles, L.

Lambert, Malcolm, D.

Lawrence, Clifford, H.

Little, Andrea, G.

Maitland, Frederic, W.

Macnair, Michael, R.T.

Mäkinen, Virpi

Marcett, Mildred, E.

Matthew, Donald

McFarlane, Kenneth, B.

Megarry, Robert, E.

Milsom, Stroud, F.

Moorman, John, R.H.

Parisoli, Luca

Pollock, Frederick

Pronay, Nicholas

Rabin, Sandra

Reimann, Mathias

Sayers, Jane, E.

Seipp, David, J.

Sheehan, Michael, M.

Smith, David, T.

Sonneveldt, Frans

St.German, Christopher

Thomas, Ann Van Wynen

Thomas, of Eccleston

Thompson, C.H.

Uthred, of Boldon

Vasey, Vincent, R.

Van Rhee, Remco

Verbit, Gilber Paul

Wade, William, R.

Walsh, Katherine

Wilks, Michael

Williams, Arnold

Workman, Herbert, B.

Wycliffe, John

Zimmerman, Reinhard